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By John W. Foster

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THE PRACTICE OF DIPLOMACY.
ARBITRATION AND THE HAGUE COURT.
AMERICAN DIPLOMACY IN THE ORIENT.
A CENTURY OF AMERICAN DIPLOMACY. Being a Brief Review of the Foreign Relations of the United States, 1776-1876. With maps.

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THE PRACTICE OF DIPLOMACY

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PRACTICE OF DIPLOMACY

AS ILLUSTRATED IN THE FOREIGN RELATIONS OF THE UNITED STATES

BY

JOHN W. FOSTER

Author of "A Century of American Diplomacy," "American Diplomacy in the Orient," etc.

BOSTON AND NEW YORK
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PREFACE

It has not been the purpose to make this work a manual of diplomatic procedure, that field being already occupied by European publications. It is rather designed as a companion volume and complement of "A Century of American Diplomacy." As the latter sought to show the influence exerted by the United States in the framing and improvement of international law, the present work is intended, primarily, to set forth the part taken by American diplomatists in the elevation and purification of diplomacy; and, secondarily, to give in popular form, through such a narrative, the rules and procedure of diplomatic intercourse. While it is prepared for the general reader, numerous citations of authorities are given to enable the student to pursue his investigation by an examination of the original sources of information.

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THE PRACTICE OF DIPLOMACY

CHAPTER I

UTILITY OF THE DIPLOMATIC SERVICE

In a previous volume I sought to show that the United States, in the first hundred years of its existence, has had a marked influence in shaping and improving international law. Its influence in elevating the diplomatic intercourse of nations has been scarcely less conspicuous. Our first plenipotentiary was distinguished for the frankness and simplicity of his conduct, and for his advanced and humane political views; our first President enjoined upon our foreign representatives high ideals and the avoidance of chicanery; and the last among our secretaries of state, whose lamented death is yet fresh in our memories, epitomized the diplomacy of the United States as the practical application of the Golden Rule.

The fact that the United States began its career as an independent state with no national history behind it, and untrammeled by precedents and traditions, made it easier for its foreign agents to discard the devious methods of the then existing diplomacy, and to follow a more sincere and upright course. It was fortunate, also, that its earliest representatives to foreign courts

were men of the first order of talents and of the highest character. Franklin and Jefferson at Paris, Adams and Gouverneur Morris at London, and Jay and Pinckney at Madrid, were unsurpassed among their contemporaries in any land for intellectual attainments and statesmanship. They were well fitted to inaugurate the diplomatic service of the new republic.

It will be the purpose of this volume to set forth the character of that service, to describe in some detail its methods and duties, and to record the achievements and mistakes of American diplomats abroad.

International law is of modern origin and recent growth, the attempt at its codification dating from the seventeenth century only, and it scarcely came to be recognized as binding upon nations before the nineteenth; but the practice of sending and receiving ambassadors or diplomatic representatives has existed among nations from the earliest recorded history. The ancient Egyptians are known to have frequently observed the practice; early biblical history contains references to the custom; it was quite common among the Greek states; and observed by Rome during both the Republic and the Empire.

But in all these cases and during the early period of modern European nations embassies or missions were used on special or extraordinary occasions only, and were of a temporary character. Not until late in the fifteenth century did the diplomatic service become permanent in its character and the governments establish resident missions or embassies. This stage of organized growth was reached, however, a century and a half

before Grotius began the task of giving shape and authority to international law. Nevertheless, the rights and duties of diplomatic representatives were at that period imperfectly defined. The great congresses or conferences following the long wars of the European powers, such as those of Westphalia, Ryswick, and Utrecht, had a marked influence in fixing more accurately their status; but not until the Congress of Vienna in 1815, at the close of the Napoleonic wars, did the grade of ambassadors and ministers become authoritatively established.

The United States, when it entered the family of nations, accepted the existing practice, and has maintained a diplomatic service similar to that of the European countries. But the question has often been raised, in and out of Congress, whether or not, in the existing conditions of the world, the system is necessary and whether its utility justifies its expense. As early as 1783, John Adams, who had just participated in the negotiation of the treaty of peace and independence, wrote Mr. Livingston, the Continental Secretary of Foreign Affairs: "I confess I have sometimes thought that after a few years it will be the best thing we can do to recall every minister from Europe, and send embassies only on special occasions." [1]

It is claimed that, with the present development of steam communication, the rapid transmission of intelligence by electricity, and the general diffusion of news by the press, diplomatic negotiations and correspond-

[1] 8 The Works of John Adams, edited by Charles Francis Adams (1853), 37.

ence might readily be carried on directly between the foreign offices of the various governments, that the interests of our citizens might be attended to by consuls, and that on extraordinary occasions the business might be intrusted to special temporary missions. With many in our country the diplomatic service is regarded as hardly more than a showy appendage of the government, and its maintenance a useless expenditure of public money. Whenever the question has been made the subject of inquiry by Congress, the various presidents and secretaries of state have given their opinion in favor of the utility and necessity of the service, and Congress has continued to authorize it. The controlling judgment is well expressed in the language of Secretary Frelinghuysen to Congress: "Diplomatic representation is a definite factor in the political economy of the world; and no better scheme has yet been devised for the dispatch of international affairs, or for the preservation of friendly relations between governments."[1] President Harrison, after his retirement from public life, left on record his view of it as follows: —

"The diplomatic service has sometimes been assailed in Congress as a purely ornamental one; and while the evident necessity of maintaining the service is such as ought to save it from the destructionists, it is quite true that our diplomatic relations with some of the powers is more ceremonious than practical. But we must be equipped for emergencies, and every now and then, even at the smallest and most remote courts, there is a

[1] House of Reps. Executive Document No. 146, 48th Congress, 1st Session, p. 1.

critical need of an American representative to protect American citizens or American interests." [1]

This subject was some years ago considered by a special committee of the Parliament of Great Britain. Lord Palmerston, the prime minister and the best informed and the most experienced statesman of his day in international affairs, was examined. John Bright put to him the question "whether it would not be practicable to transact the ordinary business by means of written communications between the two foreign offices, and when anything arose requiring particular attention to have a special mission of some member of the cabinet?" Lord Palmerston replied, "I do not think it would," and he proceeded to give the reasons for his belief.

Mr. Cobden propounded the following: "If you go back two or three hundred years, when there were no newspapers, when there was scarcely such a thing as international postal communication, when affairs of state turned upon a court intrigue, or the caprice of a mistress, or a Pope's bull, or a marriage, was it not of a great deal more consequence at that time to have ministers at foreign courts . . . than it is in these constitutional times, when affairs of state are discussed in the public newspapers and in the legislative assemblies . . . under these circumstances are not the functions of an ambassador less important now than they were two or three hundred years ago?"

Lord Palmerston replied: "I should humbly conceive that they are more important on account of the very circumstances which have just been stated. . . . I should

[1] This Country of Ours, Benjamin Harrison, 196.

think that the change which has taken place with regard to the transaction of public affairs in Europe tends to make diplomatic agents of more importance rather than of less importance." [1]

One reason why the value and importance of the diplomatic service is not readily recognized is because its work is carried on quietly and usually without the knowledge of the public. It is almost always the handmaid of peace and good-will. Very many more international controversies are settled by the unobtrusive or secret methods of diplomacy, than by either arbitration or war. The English historian, Goldwin Smith, states that Lord Stratford de Redcliffe, ambassador at Constantinople, piqued because he had been rejected as ambassador at St. Petersburg, was in large measure responsible for the Crimean War, which involved questions susceptible of a friendly settlement.[2] But such instances are rare, and make more conspicuous the ordinarily peaceful methods of diplomacy.

Secretary Frelinghuysen, in the communication to Congress from which an extract has already been made, in discussing the utility of the service says: "The successes of diplomacy are usually known but to a few, which, perhaps not unnaturally, has led to the belief, held by many, that with the introduction of the steamship and the telegraph the duties of a minister have ceased. However fast the mail or efficient the telegraph, neither can ever supply the place of the diplomatic agent who advises his government of the disposition of

[1] Senate Executive Document No. 93, 32d Congress, 1st Sess., 9.
[2] New York Independent, December 28, 1905.

the other, and conducts the personal negotiations, under general instructions from home. The government can only outline the policy; it is for the agent to accomplish the end sought."[1]

The cost of the diplomatic service of the United States cannot be urged as a reason for its discontinuance or curtailment, as no other department of the government is conducted with so small an expenditure, and no other can show greater results for the number of officials employed or the expenses incurred. The diplomatic representative is preëminently a peacemaker, and if he can through his efforts postpone a great war, or shorten it by a single day, he will save to the public treasury much more than the cost to the United States of its diplomatic establishment for an entire year, without taking into account the loss of life and the destruction of property.

While the United States has adopted the European system of a diplomatic service, in one important particular our government has not followed the general practice of other nations. In most civilized countries this service is now made a life career, and admission to it is through the lowest grades by means of an examination, which is usually competitive in its character. Young men are expected to pursue a preparatory course of study, and are required to be examined upon a prescribed list of topics framed with special reference to the duties of the service; when once admitted they are regularly advanced through the several grades, if they show by their proficiency and good conduct that they

[1] H. Ex. Doc. 146, 48th Cong., 1st Sess., 2.

are deserving of promotion; and after a long term of service they are, in many countries, retired on a pension. Such a system, though advocated by many persons who are urging improved methods in the public service, has never been adopted by our government. No examination has been required for admission to the diplomatic service of the United States either as secretary, minister, or ambassador. Appointments have been made of persons usually from civil life and without any previous diplomatic experience. The two systems have their advantages. The regular career insures secretaries fitted for their positions and ministers trained through a long series of years, and if endowed with ability and a proper temperament they are the more useful public servants because of their training and experience. But it does not necessarily follow that because a young man can pass a successful examination he is destined to make an able minister or ambassador. This has so often proved true in practice that the British and other governments have frequently found it necessary to appoint to the highest post in the diplomatic service persons from other branches of the government or from civil life. The three most prominent and efficient diplomatic representatives of the British government during the last quarter of the nineteenth century were Lords Dufferin, Pauncefote, and Cromer, none of whom was trained for the diplomatic service, but entered it in mature years from other branches of the government.

The trained diplomatic career has had many advocates in the United States, and it has often been discussed in the executive and legislative departments.

John Adams, who entertained a low estimate of the morals and efficiency of the service of the European governments of his day, expressed his view of the question as follows: —

"It is very true, that it is possible that a case may happen, that a man may serve his country by a bribe well placed, or an intrigue of pleasure with a woman. . . . It is very certain that we shall never be a match for European statesmen in such accomplishments for negotiations, any more than, I must and will add, they will equal us in any solid abilities, virtues, and application to business, if we choose wisely among the excellent characters with which our country abounds."[1]

The advocates of a competitive examination and a permanent tenure of office have stated their case with some fullness in the report of a Senate committee, especially designated in 1868, to study the subject, from which the following extract is made: —

"The want of our foreign service is special knowledge and experience on the part of those who enter it as officials. Under our present system, consular and diplomatic agents are selected without regard to their qualifications. As a rule, those appointments are bestowed as a reward or inducement to political service rather than to secure, in the interests of trade and diplomacy, the best ability which the country affords. Not one tenth of the whole number of appointees are conversant with the language, geography, laws, political economy, or material resources of the countries to which they are accredited. . . .

[1] 8 Works of John Adams, 39.

"The tenure of office, too, is so brief and uncertain that there can be but little *esprit de corps* in the service. The effort necessary to acquire professional excellence or to complete difficult and protracted public service will rarely be made without stronger motives. Continuance is necessary to usefulness in office under our present system of appointments. No man can pass from other pursuits directly into the higher grades of diplomatic and consular service and comprehend clearly the nature and scope of his duties."

The bill which accompanied the report provided for admission to the diplomatic as well as consular service, by means of a competitive examination, and made the tenure of office permanent. The committee argued that thus "a man who, after having passed his examination, begins his diplomatic career as attaché, rises to be secretary of legation, and is gradually advanced until he reaches the office of envoy extraordinary and minister plenipotentiary, has passed through a system of probation, of labor, and experience, which will naturally enable him to exercise a far-reaching and transcendent influence abroad and at home."[1]

No definite action was taken upon this report, and notwithstanding various similar efforts in later times, Congress has failed to adopt any measures providing for either an examination or a permanent tenure of office. A recent executive order, however, has been issued by the President, prescribing that vacancies in the office of secretary of embassies or legations shall here-

[1] Senator Patterson's Report, July 2, 1868, S. Rep. No. 154, 40th Cong., 2d Sess.

after be filled (a) by transfer or promotion from some branch of the foreign service, or (b) by the appointment of a person selected by the President, if, upon examination, he be found qualified for the position.

The examination prescribed is to be conducted by one of the assistant secretaries of state, the solicitor of the department of state, and the chief of the diplomatic bureau. The subjects to which the examination shall relate are to be international law, diplomatic usage, and modern languages; and familiarity with at least one foreign language will be required.[1]

This executive order is an advance over any previous method of filling the lowest grade of diplomatic offices, but it has a serious defect. It does not remove admission into the service from the baneful influence of political favoritism, and hence offers the young men of the country little encouragement to prepare themselves for the diplomatic career. Besides, this executive order is not binding upon a succeeding President, and without legislation it cannot establish a permanent reform.

In recent years some of the American universities have established schools of diplomacy and politics to enable young men to equip themselves for the foreign service, as also to make them better fitted to discharge the duties of citizens at home. They are useful adjuncts to a university curriculum, but will not be largely patronized until the doors of access to the public service are thrown open by law to competitive examination.

[1] President's order for appointment of secretaries of embassies and legations, November 10, 1905.

The failure of Congress to legislate respecting the diplomatic service is, in part at least, based upon what is claimed to be the success of our present system. It is pointed out that in the history of the country the solid achievements of American diplomacy equal those of any European nation, and that we do not suffer by comparison in the personnel of the corps. It is contended that the American representatives at the European courts have, as a rule, been men of first ability and culture, many of them subsequently filling the posts of president, chief justice, secretary of state, and other cabinet offices, and highly distinguished at home and abroad; while the European diplomats sent to Washington have scarcely equaled them in attainments and distinction.

The fact is not to be disguised, however, that the evil practice of rewarding politicians with prominent offices is attended with consequences demoralizing to the service. Secretary Hay, referring to the custom of appointing to foreign missions members of Congress who had been defeated for reëlection, in one of those sallies of wit for which he was famous, said: "A quiet legation is the stuffed mattress which the political acrobat wants always to see ready under him in case of a slip."[1] Favors bestowed solely for party service have resulted occasionally in sending abroad as diplomatic representatives men of bad manners and dissolute habits, who have brought the service into ill repute, and caused Americans to blush for their country.

Some years ago, while I was touring with a party of

[1] The Century Magazine, January, 1906, 448.

friends in a remote section of the Rocky Mountains, on a Sunday we attended service in a Canadian Presbyterian Church. The minister in illustrating his text — "We are ambassadors for Christ" — stated that the United States had at one time an ambassador in Germany who was almost constantly in a state of intoxication. This, he said, created in the minds of the Germans the impression that the Americans must be a nation of drunkards. One of the successors of this representative at the court of Berlin has recorded that his countrymen at that capital even failed to keep him sober for his first presentation to the king.[1]

An anecdote is told of Secretary Seward that to a citizen who was remonstrating with him against continuing in the service a minister who was disgracing his country and wondering how such an appointment could be made, he replied: "Sir, some persons are sent abroad because they are needed abroad, and some are sent because they are *not* wanted at home."

Such appointments were more frequently made before the Civil War, and it is gratifying to note that greater care has been exercised in this regard of late years, and a higher standard of culture and morality is preserved. While it does not palliate the disreputable conduct of American representatives abroad, it may be said that the permanent diplomatic service which is maintained by other governments has not resulted in excluding entirely unworthy persons.

The diplomatic corps at Washington is usually composed of gentlemen of ability, of culture, and of a high

[1] 2 Autobiography of Andrew Dickson White (1905), 356.

standard of personal character; but there have been notable exceptions. The government of the United States has been compelled to summarily dismiss or ask for the recall of ministers for flagrant violations of the established usages of diplomacy or the rules of international law; others have resorted to their diplomatic immunity to escape the payment of honest debts; and still others have offended respectable society by immoral relations. Neither the one method nor the other can entirely eradicate the frailties of our weak human nature.

The system followed by the United States exposes the government to mistakes and sometimes to mortification and ridicule because of the inexperience of its representative. But appointments to the higher posts are generally of persons who have served and gained distinction in legislative bodies or in the professions, and, though not experienced in the arts of diplomacy and court etiquette, they are usually able to cope with their colleagues on all subjects where great principles are involved. It will probably be many years before Congress will adopt the European system in full, but it is not too much to hope that provision shall be made by law whereby admission to the post of secretaries shall be regulated by competitive examinations, that branch of the service made permanent, and that it shall be largely drawn upon to fill the place of ministers.

CHAPTER II

RANK OF DIPLOMATIC REPRESENTATIVES

THE grade or rank of diplomatic representatives has been the subject of discussion and fierce controversy from the date of the first establishment of permanent missions, four centuries ago, and although it was finally and definitely settled at the Congress of Vienna in 1815, and that settlement was accepted and has been followed by the United States, it has recently been a new source of discussion and embarrassment even in Washington. Hence it may be germane to our topic to make some reference to this controversy in the past.

A diplomatic envoy is the representative of his government or sovereign, and his claim of rank is for his country and not for himself; so that the controversy in the past has been one of nations rather than of persons. During the mediæval period the struggle of the European nations for preëminence in rank was the special feature of the era, and it gave rise often to the most absurd pretensions. It was sought to be maintained for various reasons, such as: the title of the sovereign, the size of the dominions, the antiquity of the royal family or date of independence of the country, the nature of the government (whether monarchy or republic), the population, its achievements in arms, the date of the conversion of the people to Christianity, and

even the services rendered to the Pope or the church. Up to the time of the reformation the Pope was universally recognized in christendom as having precedence over all other sovereigns; next in order was the emperor of Germany as the successor of the Roman emperor, and below them a constant strife existed among the nations. For a time the republics were refused what were termed "royal honors," but finally Venice, the United Netherlands, and Switzerland were accorded recognition in the order of precedence here named. The title of emperor was sought to be made exclusive to the old German Empire, and Russia was forced to wait several generations after its ruler assumed that title before he was accorded recognition as such.

Four centuries ago the Pope of Rome, by virtue of his conceded preëminence and ecclesiastical authority, sought to settle the vexed question by issuing an order fixing the relative rank of the then existing nations of Christendom. It illustrates the intensity of feeling which the question had aroused to state that, notwithstanding the high papal authority of that day, this arbitrary settlement was not accepted generally, and was observed in Rome only, and even there merely for a brief period. It also illustrates the evanescent character of the honor and the changes of the governments of the world to note that, of the score and a half of nations enumerated in the papal order, only three (England, Spain, and Portugal) exist to-day with the royal titles then accorded them. It is also curious to note that in this table of precedence England stood eighth in order, and Russia does not appear in the list.

A large part of the deliberations of the great congresses of European nations up to and even including the early part of the last century was taken up in settling the question of precedence among the envoys or delegates. This was notably so at the Conference of Westphalia. At the Congress of Ryswick a warm debate occurred over the demand of the ambassadors of the emperor of Germany that a particular space should be set apart for their carriages, and that this should be the post of honor. A fierce quarrel occurred over the allotment of rooms. In the conference room a single table had been provided, but no agreement could be reached as to the order of seating, and so in that room they all stood; and another room was provided in which there was no table, and the envoys sat in a circle. At the Diet of Regensburg the precedence of the ambassadors was decided by an arithmetical rule by which each had precedence over the rest twice in ten days. At Utrecht a round table was used, but this lost its accommodating qualities when it was discovered that the place of honor was opposite the door of entrance, and that every place of honor has a right and a left. At this congress a quarrel for precedence took place between the footmen of the several ambassadors, in the account of which, occupying thirty pages in the "History of the Congress," it is recorded that it "threatened to retard the peace of Christendom." Addison gives an amusing account in the "Spectator," of a discussion over it which he heard in one of the coffee houses in London, the result of which he sums up in these words: "All I could learn at last from these honest gentlemen was that the matter

in debate was of too high a nature for such heads as theirs, or mine, to comprehend."[1] Macaulay, in his "History of England," describes in his best vein the proceedings of the Congress of Ryswick, which well illustrates these idle controversies.[2]

The contest of envoys to these international congresses of the past has been not more animated and absurd than that of the envoys to the several courts of Europe. Many amusing and some tragic incidents have been narrated respecting the latter, from which I give the following instances. It is related that the Spanish ambassador to England in 1661, in order to secure a place in the royal procession next to the king and before his French colleague, attacked the latter's coach in the streets of London, hamstrung his horses and killed his men, thus vindicating his country's greatness.

When the plenipotentiaries of France and Austria met to settle the conditions of marriage between Louis XIV and Maria Theresa, in order to preserve the full dignity of their nations, they stepped together, with the right foot, side by side, into a council chamber hung in corresponding halves with their respective colors, and sat down at the same instant precisely opposite each other at a square table, on two mathematically equivalent armchairs. Such events as these in statecraft led Voltaire to remark that armchairs, backed chairs, and stools were "important subjects of politics, and illustrious subjects of quarrels" in those days.

A story is told of two newly arrived envoys from

[1] The Spectator, No. 481, September 11, 1712.

[2] 4 History of England, Macaulay (ed. 1855), 788.

Italy and Germany, who, being unable to agree as to which should first present his credentials to the king of France, stipulated that whoever reached Versailles soonest on the day of their reception should take precedence of the other. The Prussian went the night before the audience and sat on a bench before the palace until dawn. The Italian arriving early in the morning, saw the Prussian there before him, and slipped surreptitiously through the door of the king's bedroom and commenced his speech of audience. The Prussian rushed after him, pulled him back by the skirts, and commenced his harangue. The memoirs of diplomatists and the histories of Europe are full of the extreme and absurd contentions of envoys, but the foregoing are sufficient to illustrate their extreme and often farcical pretensions.

None of the monarchs of Europe was more insistent upon his rank than the "Little Corporal" when he made himself emperor of France. On inviting the Pope to attend his coronation, it was stipulated that the same ceremonies should be observed as at the coronations of the ancient kings of France, but on the arrival of the Holy Father the latter was astonished to see Napoleon take precedence over him, as if there was no question about it. In 1808 he caused the edition of the "Almanach de Gotha" to be seized because, as was its custom, it arranged the reigning houses alphabetically and did not place Napoleon first.

The contest as to the rank of states which had been waged for centuries was sought to be settled at the Congress of Vienna of 1815. A committee was appointed with instructions to fix the principles which

should regulate the rank of reigning monarchs and all questions connected therewith. The committee submitted a report to that end, but after a long discussion the Powers abandoned the project as one too difficult to realize, and confined their action to prescribing the composition and rank of the diplomatic corps only at their respective courts. But since that period, by the practice of governments, it has come to be recognized by them all that there can be no rank or precedence among independent and sovereign nations, but that all must stand on an equality in their negotiations. For instance, at the conference at Paris in 1856, one of the most important in that century, the representatives sat at a round table in the alphabetical order, in the French language, of their national titles. In the Bering Sea Tribunal of Arbitration of 1893 the United States had precedence over Great Britain because of this order of arrangement. The same practice was observed at The Hague Peace Conference of 1899. At that conference it was expressly declared by the representatives of the Great Powers of Europe, "here there are no great, no small, powers; all are equal."

The United States accepted the order prescribed by the Congress of Vienna in 1815, which, with the addition made in 1818, recognized the composition of the diplomatic corps in four classes, with rank in the order named: 1st, Papal nuncios and ambassadors; 2d, envoys or ministers plenipotentiary; 3d, ministers resident; 4th, chargés d'affaires. As a rule, each government decides for itself the rank of the diplomatic representative it sends abroad, but it usually follows the existing

practice of countries of relative conditions.[1] For more than a century the United States sent only representatives of the second, third, and fourth class. At the beginning of its history it did not appoint ambassadors, and the practice of sending only ministers was followed up to a recent date.

Our ministers plenipotentiary at the capitals of the Great Powers where ambassadors were maintained repeatedly complained to the secretary of state that they were often humiliated and their usefulness sometimes impaired by the lower rank to which they were assigned in the diplomatic corps, and this assertion gained general currency and acceptance through the press. It is true that ambassadors take precedence over ministers in the order of reception and seating on public occasions, at entertainments, and, at some European capitals, in the order of their admission to interviews at the foreign office. It certainly is not agreeable to a minister of the great American Republic, if he arrives first at the Foreign Office, to be required to step aside and give place to the representative of Turkey or Spain, and wait till the latter's audience with the secretary for foreign affairs is concluded, simply because he bears the title of ambas-

[1] In 1790 President Washington proposed to send a chargé d'affaires to Lisbon. The Portuguese government represented that "circumstances did not permit them to concur in the grade of chargé d'affaires — a grade of little privilege or respectability by the rules of their court, and held in so low estimation with them, that no proper character would accept it to go abroad." The President communicated this fact to the Senate and nominated a minister resident, saying: "I have decided to accede to the desire of the Court of Lisbon, in the article of grade. . . . I do not mean that the change of grade shall render the mission more expensive." — 1 American State Papers, For. Rel. 127.

sador. Mr. Bancroft, the American Minister at Berlin, when subjected to this treatment protested against it, and Prince Bismarck decided that the practice should not continue. The rule promulgated by the prince was that "the chief of a mission who arrives first at the Foreign Office is first admitted, be his rank that of ambassador, minister, or chargé." The same rule prevailed for some time at St. Petersburg.[1]

Other American ministers, who were made to suffer inconvenience or humiliation from the custom, might possibly by firm or considerate remonstrance have obtained relief. The remedy uniformly suggested has been to raise the grade of representatives at the capitals named to that of ambassador, but the successive secretaries of state declined to make the recommendation to Congress. Such was the action of Secretary Marcy in 1856. Secretary Frelinghuysen said that the department could not, "in justice to its ministers abroad, ask Congress to give them higher rank with their present salaries; neither could it with propriety appeal to Congress for an allowance commensurate with the necessary mode of life of an ambassador." When in 1885 Mr. Phelps, the American Minister to Great Britain, urged that his mission be raised to an embassy, Secretary Bayard replied: "The question of sending and receiving ambassadors, under the existing authorization of the Constitution and the statutes, has on several occasions had more or less formal consideration, but I cannot find that at any time the benefits attending a higher

[1] 1 A Digest of International Law, by Francis Wharton, 1887, 625; American Diplomacy, by Eugene Schuyler, 1886, 113.

grade of ceremonial treatment have been deemed to outweigh the inconveniences which, in our simple social democracy, might attend the reception in this country of an extraordinarily foreign privileged class." [1]

These reasons against creating for the United States the grade of ambassador would seem to be conclusive, but in 1893 Congress did just what Secretary Frelinghuysen said would be an injustice to our ministers — authorized the grade without increasing the pay of its representatives. The legislation to this effect was inserted as a clause in one of the regular appropriation bills, and was passed through both houses without a word of discussion or comment. If its effect in changing a practice of the government for a hundred years had been made known at the time, it is extremely doubtful that it would have secured the approval of Congress.[2]

I defer a consideration of the question of expense till I come to consider the subject of salaries in the diplomatic service, remarking only that the effect of the law is to make it possible for a man of wealth alone to accept appointment as an ambassador. Constant complaint was made that the salaries of our ministers at

[1] 1 Wharton's Digest, 623–625.

[2] The Act of Congress is as follows : —

"Be it enacted, etc. . . . (par. 1) Whenever the President shall be advised that any foreign government is represented, or is about to be represented, in the United States by an ambassador, envoy extraordinary, minister plenipotentiary, minister resident, special envoy, or chargé d'affaires, he is authorized, in his discretion, to direct that the representative of the United States to such government shall bear the same designation.

"This provision shall in no wise affect the duties, powers, or salary of such representative." — Act of March 1, 1893.

London, Paris, Berlin, St. Petersburg, Vienna, and Rome were far below the demands of the posts, and now that they have been raised to embassies, which require the maintenance of large houses or palaces, and a much more lavish style of living, the expenditures of the posts are greatly increased. It is a sad day for a republic when its highest offices cease to be rewards of merit and fitness, and when they can be filled only by rich men.

The second objection to the creation of ambassadors is that forcibly suggested by Secretary Bayard — the establishment of a kind of monarchical class ill befitting our plain democratic pretensions. An ambassador has been held in Europe to be the special representative of the sovereign, and to stand in his place at the foreign court, with the right to claim audience at any time with the head of the state, and entitled to privileges and honors not accorded to other envoys of nations. The claim, as we shall see, is in great part fictitious,[1] but it is sufficiently well established in European practice to introduce a disturbing element into our American society. Events in Washington following the establishment of embassies has shown that Secretary Bayard was not astray in his fears as to "the inconvenience which, in our simple social democracy, might attend the reception in this country of an extraordinarily foreign privileged class." The recognition by the President of ambassadors from Great Britain, France, Germany, Russia, and Italy, in reciprocity for our nomination of ambassadors to those powers, was followed by a scan-

[1] See infra p.

dalous scene in the Senate chamber on the first inauguration day following their appointment. In the zeal of the subordinate officials to show special honor to these newly-created and exalted dignitaries, all the other members of the diplomatic body were neglected and left to find their way to their residences without an opportunity to witness and honor the induction of the new President into office. And if the press reports are to be credited, further trouble was occasioned by the question of the proper location of the ambassadors at the next inauguration.

Then came the problem whether or not the Vice-President of the United States should make the first call upon the new ambassadors, and the further question whether or not the secretary of state, who stands second in succession to the presidency, and on the death of the Vice-President first in succession, should give place at entertainments and public functions to these dignitaries. These momentous questions were doubtless settled aright in the light of European precedents, and the good sense and prudence of the eminent gentlemen who hold the ambassadorial rank have, it is probable, prevented other embarrassing and foolish questions from arising; but these events, and those which attended the advent of the first Mexican ambassador, whose coming was resented by the European ambassadors, as well as the later unpleasant incident at the White House, when the ambassadors collided with the Supreme Court, would have been avoided if the Act of 1893 had not been passed.

When the act creating ambassadors was passed by

Congress, the government of the United States had grown to recognized greatness and dignity in the eyes of European sovereigns, its diplomatic service had in the past hundred years and more won deserved honor and distinction, and it did not require the bauble of a title to give its envoys greater standing or efficiency. I doubt very much that the absence of rank has ever prevented any really able minister of the United States from rendering his country a needed service.

The true remedy for the embarrassment which American diplomatists suffered in the great European capitals because of rank was not in servilely following monarchical customs by the creation of a new grade in our service, but in our government taking the initiative in a movement for the abolishment of all rank in the diplomatic body. In the reference to the foolish contests which were carried on for centuries by the nations of Christendom, great and small, for precedence, we have seen that only one solution of the problem could be found, and that was so simple that we wonder now that so fierce a warfare could have been possible — that is, a recognition of the equality of sovereign nations, so that to-day the smallest republic of Central America is equal, in negotiations and at international conferences, with the most powerful empire of Europe. There will be no satisfactory settlement of the question of diplomatic rank until all class distinctions and privileges are abolished, and a single grade is established in all the capitals of the world.

The Congress of Vienna placed nuncios and legates in the same grade with ambassadors. Since the Refor-

mation these have been sent by the Pope to Catholic countries only, and in the courts to which they are accredited they are given precedence over ambassadors. No Papal nuncio has ever been accredited to the United States. American ministers resident at the courts of Europe to which Papal nuncios are accredited have, however, recognized the precedence accorded them by making the first visit and in otherwise observing the courtesies due to their established station; and this action has been approved by the Department of State.[1]

Although, as stated, each government determines for itself the grade of representative it will send to other countries, reciprocity of grade is not always observed. A representative of a lower grade is sometimes received from a country to which one of a higher grade is sent. The irregularity of rank is likely at any time to create diplomatic embarrassments, as it already has done in more than one instance. We have seen that the reception at Washington of an ambassador from Mexico was resented by the ambassadors of the European powers. The real ground for their resentment was that the first person sent as Mexican ambassador was a member of the court-martial which condemned the so-styled Emperor Maximilian to death, although it was alleged that they did not regard Mexico as sufficient in population and importance to exercise the right of ambassadorial appointment.[2] Suppose China, embracing more than

[1] Foreign Relations of the United States, 1875, 1115, 1119.

[2] "Instances of the boycotting of foreign diplomats by their colleagues are by no means so rare as one might imagine. The ostracism is, however, generally due to a cause of social character, and there are very few instances of an envoy being subjected to such treatment as the Mexican

one fourth of the population of the earth, older by thousands of years than the oldest of the so-called great Powers of Europe, and possessing a high standard of civilization and intellectual attainments, should accredit ambassadors to those powers — upon what reasonable ground could they be rejected? And yet should they have an intimation that such was the intention of that ancient empire, it is probable that its foreign office would receive such representations as would lead it to desist from its intention.

The republic of Brazil recently decided to raise its legation in Washington to an embassy. In due reciprocity the American minister to Brazil has been named an ambassador. The public press has reported that, while some doubt existed as to the propriety of such action, it was held that under the law of Congress of 1893, already quoted, the government of the United States had no power to determine the grade of the diplomatic representative sent to it by a foreign power. If such is the case, Hayti or Montenegro might send an ambassador to Washington.

The most serious embarrassment resulting from this difference in grade of diplomatic representation is illustrated by the relations at present existing between the United States and Turkey. For a number of years past these relations have been in a most unsatisfactory condition. In no country of the western world could the old fiction of the ambassador as the personal representative of the sovereign to-day approach so nearly

Ambassador at Washington suffered, merely for political reasons." — Marquise de Fontenoy.

a reality as in Turkey, as the Sultan is more fully than any other monarch the personal ruler of the state. All the Great Powers of Europe, and even the Shah of Persia, are represented at Constantinople by ambassadors, and they exercise the right of access to the Sultan at will to discuss official matters. The American ministers plenipotentiary have represented to their country that it is very difficult to get any just and proper consideration and dispatch of their business, because of the irresponsible character of the secretary for foreign affairs and even of the grand vizier, as all important matters are determined by the Sultan; and that, as they do not possess the ambassadorial character, they cannot without great difficulty have audience with him to discuss official business.

To remedy this embarrassment, President McKinley caused application to be made to the Turkish government for the appointment by the two governments respectively of ambassadors; but the proposition was not accepted by Turkey. The condition of the interests of American citizens in that empire continuing to be very unsatisfactory, President Roosevelt renewed the application for the appointment of ambassadors; but it was again rejected. It cannot well be understood in the United States why this application should be refused, when ambassadors from much smaller and less powerful countries, like Italy and Persia, are received at Constantinople.[1]

[1] The diplomatic appropriation bill of 1906 has provided for the appointment of an ambassador to Turkey. It is believed that the Sultan will not defy the wishes of Congress as he has those of the President.

In 1903 a delegation of some of the most prominent citizens of the United States, representing large property interests in the Turkish Empire, made a visit to Washington and laid before the President a memorial, setting forth that American citizens and property in that empire were denied the rights and protection which had been secured by the ambassadors of the Great Powers of Europe to their subjects and property interests. The President, being impressed with the justice of the memorial, caused a cable instruction to be sent to the American minister in Constantinople directing him to ask an audience of the Sultan in the name of the President, to enable him to communicate a message from the President to the Sultan on the subject of the memorial. After a delay of some weeks an audience was granted on the express condition that the minister should be limited to delivering the message of the President, but that he would not be permitted to discuss the subject with the Sultan.

Even this decisive action of the President seems to have had no effect, as the American citizens continued to be deprived of the rights and privileges enjoyed by the subjects of the Great Powers of Europe, and for a third time an application was made and rejected for the reception of an American representative with the grade of ambassador. The American minister at Constantinople, under renewed and urgent instructions from Washington, pressed for a settlement of the question at issue, but he was greatly delayed and embarrassed by the fact that the ministry have no real power to dispatch any important public business, because the Sultan

reserves to himself that prerogative, and by the further fact that, not being an ambassador, he found great difficulty in reaching the Sultan. Meanwhile, this important question remained undetermined, and it became necessary to dispatch a formidable American fleet to Turkish waters to evidence the President's interest in the question, and the fleet was held in the Turkish port until a promise was exacted that the demand of the United States would be complied with; but even that promise remains unexecuted. What more striking argument can be presented against the maintenance of the various grades in the diplomatic service?

There is no good reason why the representative of the smallest American republic or European principality should have a different standing at the Foreign Office in London, for instance, from that freely conceded to him in the Peace Conference of the nations at The Hague; neither is it reasonable that any government, because of a mere grade in the diplomatic body, should be compelled to make a more lavish display at a foreign court than its principles or convenience justified.

Reference has been made to the question raised as to the relative rank of the secretary of state and of the ambassadors at Washington. Following the practice existing in European countries, the secretary yielded the the precedence to the ambassadors. But if that practice should be strictly followed an argument might be advanced in favor of the secretary. In the monarchical countries, not only the heir-apparent but all the children of the reigning sovereign, as also the brothers, nephews, and grandsons, have precedence over ambassadors. By

virtue of a recent act of Congress the secretary of state is made the successor to the presidency, in the event of the death of the President and Vice-President. By a parity of reasoning the secretary standing so near in the line of succession to the chief-magistracy, a claim might be urged for him of precedence over the ambassadors.

Before the act of Congress cited was passed, the secretary of state had been recognized as the head of the cabinet. This grew out of the fact that the Department of State was the first created, and the custom was established in legislation of naming the secretary of state first in the cabinet list. For twenty years and more after the organization of the Federal government the secretaries of state and of the treasury received higher salaries than their colleagues. But the chief of the Department of State has not always held this pre-eminence unchallenged. The cabinet of Mr. Monroe had more than one aspirant to be his successor, and they conspired against the more prominent candidate, John Quincy Adams, secretary of state. They first succeeded in making by act of Congress the salaries of the cabinet officers uniform. They then demanded social equality. It had been the practice from the foundation of the government for the President to invite only the secretary of state to the diplomatic dinners. President Monroe was given to understand that henceforth such a distinction would be considered offensive to the other heads of departments. The President determined to invite thereafter to the diplomatic dinners all the cabinet officers. Mr. Adams narrates the result in his diary: —

"The Foreign Ministers, though willing to yield pre-

cedence to the Secretary of State, are not willing, at dinners of professed ceremony given to them, to be thrown at the bottom of the table by postponement to four or five heads of Departments and their wives. To avoid these difficulties, Mr. Monroe last winter invited the Foreign Ministers without any of the heads of Departments, and to fill the table invited with them the navy commissioners and some respectable private inhabitants of the city. But this did not escape remark. The Foreign Ministers were not pleased at being invited with persons of inferior rank and private citizens, nor at the absence of the Secretary of State, with whom they had usually been associated on these occasions heretofore. The slight to the Secretary of State himself by the omission to invite him as heretofore was also noticed . . . by the Foreign Ministers and by all the gossips of the District, who have drawn many shrewd conclusions from it. . . . These incidents, apparently so insignificant and contemptible, are connected with all the pantings of Crawford's ambition, and with the future history of this nation and of the world."[1]

[1] 4 Memoirs of John Quincy Adams (1874), 293. Mr. Crawford was a member of the Cabinet and Adams's competitor for the presidency.

CHAPTER III

THE APPOINTMENT OF DIPLOMATS

The diplomatic representation of the United States to other countries consists at present of ten ambassadors, twenty-seven ministers, two ministers resident, who also act as consuls-general, and one diplomatic agent and consul-general. Six of the ministers plenipotentiary are accredited to more than one state: the minister to Greece acting also as minister to Montenegro, and as diplomatic agent to Bulgaria; the minister to Roumania also to Servia; the minister to the Netherlands also to Luxemburg; the minister to Guatemala also to Honduras; the minister to Nicaragua also to Salvador and Costa Rica; and the minister to Uruguay also to Paraguay. The representative of the United States at Cairo is styled Agent, out of deference to the Sultan, the Khedive of Egypt being under his suzerainty, but for all practical intercourse free from his control.[1]

Other governments follow the same practice as to combining two or more countries under one diplomatic representative. Adjoining countries are often associated in missions, because of proximity. A number of ministers to the United States are also accredited to Mexico. A single minister is often accredited to more

[1] This classification is in conformity with the diplomatic appropriation bill of 1906.

than one of the Central and South American republics, as also to Sweden and Denmark, Belgium and Holland. The Chinese minister to the United States has the unique duty of also representing his country to the republics of Mexico, Cuba, Panama, and Peru, because of the large population of Chinese laborers in these countries.

The embassies are provided with two or three secretaries, and most of the legations with one secretary and two of them with second secretaries. The embassy to Japan has also a Japanese secretary and six student interpreters, and the legation in China a Chinese secretary and ten student interpreters. In addition to the foregoing, which constitutes the diplomatic body, there are attached to several of the embassies and more important legations military and naval officers.

In the early history of European diplomatic intercourse it was the practice to require reciprocity in the exchange of envoys, governments going to the length of not allowing a retiring representative to depart till assurance was received that another would be sent. The English government of that period insisted that a French ambassador should embark at Calais at the same hour that an English ambassador embarked at Dover. But such strictness has long ago ceased.

John Adams resided three years in London as minister without any British representative being sent to the United States. After his return to America, President Washington consulted him as to the course we ought to pursue as to our diplomatic intercourse with Great Britain. In his reply he said: "The utmost length that

can now be gone, with dignity, would be to send a minister to the court of London, with instructions to present his credentials, demand an audience, make his remonstrance; but to make no establishment, and demand his audience of leave and quit the Kingdom in one, two, or three months if a minister of equal degree were not appointed and actually sent to the President of the United States from the King of Great Britain."[1]

Washington did not deem it prudent to follow this advice, but named Gouverneur Morris an agent to go to London and confer unofficially with the officials as to the most urgent pending questions. A British minister was not appointed to the United States till 1791, eight years after the treaty of peace and independence. His arrival in the United States was soon followed by the appointment of a permanent minister from the United States to London.

It is the usual practice of nations at the present day to observe reciprocity in the exchange of ministers, but the United States has never construed this practice strictly, and it sends ministers to not less than eight states which do not maintain regular diplomatic representatives in this country.

It is the practice in Europe before publicly announcing the appointment of a new ambassador or minister to privately consult the government to which he is to be accredited, to ascertain whether he will be acceptable to it, *persona grata;* and refusals are not uncommon. Only a few years ago the German government is understood to have refused three persons successively pro-

[1] Letter of August 29, 1790. 8 John Adams's Works, 499.

posed by Great Britain as ambassador at Berlin before an acceptable one was found. Up to a recent date the practice was not followed by the United States.

In the discussion which was occasioned by the rejection of Mr. Keiley as minister to Austria, in 1885, Secretary Bayard stated "that no case can be found in the annals of this government in which the acceptability of an envoy from the United States was inquired about or ascertained in advance of his appointment to the mission for which he was chosen;"[1] and he proceeded to show that this action was based upon our peculiar political system. But since the act of 1893, creating the grade of ambassadors, it has been thought expedient by the Department of State, owing to the fiction that they stand in closer relation to the sovereign than a minister, to advise the foreign government of the intended nomination of an ambassador before his name is sent to the Senate. If Secretary Bayard's argument is of any force it furnishes an additional reason against the wisdom of the act. The ancient practice of our government as to diplomatic representatives below the grade of ambassadors is still adhered to.

Foreign governments have sought from time to time to follow the European practice in their relations with the United States. As early as 1802 our minister in London, Rufus King, reported to the secretary of state that the British Foreign Office had consulted him about the appointment of a new minister, and mentioned to him the names of two persons which it had under consideration for the place; and that he indicated his

[1] Senate Ex. Doc. 4, 49th Cong., 1st Sess. 10.

preference for one of them, who was accordingly appointed.[1] It turned out, however, that Mr. King's choice was most unfortunate, as he indicated Mr. Merry, who was the source of much annoyance to President Jefferson and Secretary Madison.[2]

Similar instances are reported of the efforts of foreign governments, in later years, to consult as to the acceptability of proposed ministers, and the custom of the Department of State has been, when such notice was given, to state "that this goverment does not require other powers to ask in advance if contemplated appointments of ministers will or will not be acceptable;" but where objections are known to exist it has been deemed proper to communicate them in reply. It would seem that if there is good reason for consulting the foreign government before the appointment of ambassadors, the reason would also apply in the appointment of ministers. The cases which follow show that such a practice would often avoid embarrassment for the secretary of state and mortification to the person nominated.

Every government has the right to refuse to receive any diplomatic representative whom it regards as objectionable, and it is not required to give the reasons for its actions, although they are generally made known. It is considered the duty of the nominating government to accept this action, whether or not it regards the reasons, if given, satisfactory. The reasons given are generally of a personal character, but the political opinions of the person nominated, social conditions, or

[1] 4 Life and Correspondence of Rufus King (1897), 100.

[2] A Century of American Diplomacy, by John W. Foster, 211, 220.

resentment toward the government making the nomination, sometimes influence the rejection. It was a rule of the British court in Queen Victoria's reign that a divorced person would not be received, and the ambassador of a great power was rejected because he had married a lady divorced from her former husband.[1]

Several instances have occurred of the rejection of American ministers appointed to foreign governments. An examination of some of these cases will illustrate the causes which are recognized by governments as justifying their conduct. The earliest of these is the case of Charles C. Pinckney of South Carolina, a person of high character and eminent services, who was in 1796 appointed minister to France to succeed James Monroe, whose recall by President Washington had greatly displeased the French Directory. In order to show its resentment, the Directory refused to receive Mr. Pinckney, treated him with great discourtesy, and ordered him to quit the country.[2] Mr. Pinckney afterwards served in the Commission of 1797 to adjust our differences with France. To him was attributed the utterance which became famous: "Millions for defense, but not one cent for tribute;" and the words have been inserted on the tablet to his memory in his native city. But it is now known that the expression was not used by him, but by a friend in a eulogy upon his career.[3]

Anson Burlingame, a member of Congress from

[1] Schuyler's American Diplomacy, 155.

[2] For Monroe's mission and recall, see Foster's American Diplomacy, 172–176.

[3] South Carolina Historical Mag., January, 1900, 100.

Massachusetts, was appointed by President Lincoln in 1861 minister to Austria. On his arrival at Paris, en route to his post at Vienna, he reported to the Department of State that the secretary of Prince Metternich, Austrian ambassador to France, called on the secretary of the American legation with the message that the prince would be pleased to have Mr. Burlingame remain at Paris until the way might be clear for his presentation at Vienna. Mr. Burlingame stated to the department that the trouble probably sprang from his authorship and advocacy of the bill raising the Sardinian mission from minister resident to minister plenipotentiary, taken in connection with his well-known sentiments in favor of the Italians. He had likewise been an ardent friend of Hungarian independence. He added this comment: "If the Austrian government choose to make an issue . . . involving the assumption, on her part, of the right to demand that we should send, not an American, but an Austrian, in feeling, she will, in my opinion, prove weak where she has been strongest in her diplomacy." He proposed to the department to go on to Vienna and force a decision, but Secretary Seward concluded that the better solution was to transfer him to China, a course which resulted in greatly enhancing his usefulness and fame.[1]

The case of A. M. Keiley, a prominent lawyer of Virginia, is one which occasioned a lengthy correspondence and attracted much attention. He was appointed minister to Italy by President Cleveland in March, 1885,

[1] For Mr. Burlingame's later career, see American Diplomacy in the Orient, by John W. Foster, 257, etc.

and confirmed by the Senate, April 2. Ten days after his confirmation an account appeared in a New York city newspaper giving a report of a public indignation meeting held in a Catholic church in Richmond, Virginia, in 1871, after the occupation of Rome by the king of Italy. Mr. Keiley was chairman of a committee which brought in a resolution, adopted by the meeting, "protesting against the invasion and spoliation of the States of the Church by King Victor Emmanuel as a crime against solemn treaties," and, in advocating it, Mr. Keiley made a bitter attack upon the king.

The Italian minister in Washington lost no time in bringing the publication to the attention of his government, which instructed him by cable to say to the American government that it was impossible that Mr. Keiley "might be a *persona grata* to our king," and expressing the hope that the United States government would be willing to bestow a new proof of sincere amity in appointing another candidate as its representative at Rome. Mr. Bayard, secretary of state, recognized the right of Italy to object, Mr. Keiley tendered his resignation, and the incident was closed so far as Italy was concerned, but it only opened a new and more interesting chapter in diplomacy.

The day after the tender of his resignation as minister to Italy, Mr. Keiley was nominated as minister to Austria, and he was promptly confirmed by the Senate. On May 4 Secretary Bayard notified the Austrian minister in Washington of the appointment and bespoke for him "that favorable reception at Vienna which is due to his merits as an American citizen of great ability

and character." Within four days a cabled notification in writing was delivered to Secretary Bayard "that here [in Vienna] too, like in Rome, prevail scruples against the choice," and he was earnestly entreated that the newly nominated minister might not reach Vienna "before our confidential consent to his nomination has taken place;" and it was added that "the position of a foreign envoy wedded to a Jewess by civil marriage would be untenable and even impossible in Vienna." But Mr. Keiley had sailed for his post before the notification was received.

After a delay of ten days Secretary Bayard sent the Austrian minister in Washington a long and caustic note, in which, referring to the ground of objection that Mr. Keiley's wife was a Jewess, he stated that such an objection could not be assented to as valid by the American government or people, but "must be emphatically and promptly denied;" that "religious liberty is the chief cornerstone of the American system of government . . . imbedded in the written charter and interwoven in the moral fabric of its laws;" that a contrary doctrine cannot "for a moment be accepted by the great family of civilized nations or be allowed to control their diplomatic intercourse." While Mr. Bayard recognized "the undoubted right of rejection," he "most earnestly and respectfully craved the Austrian government to reconsider its views." Apparently not satisfied with the fullness of his first communication, it was followed two days later by a second note in which he set forth the practice of the United States not to consult a foreign government as to the acceptability of a minister

in advance of his appointment, and proceeded to show that there were important reasons why the European practice had never been adopted by his government.

These letters led the Austrian government to modify the ground of its objection. It declined to conduct a discussion with the government of the United States upon religious liberty and diplomatic law, "as in Austria as well there was entire liberty of religious worship." The objection to Mr. Keiley's reception was then stated to be "founded upon want of political tact evinced on his part on a former occasion, in consequence of which a friendly power declined to receive him; and upon the certainty that his domestic relations preclude that reception of him by Vienna society which we judge desirable for the representative of the United States." The correspondence and discussion continued through several months, the Austrian government remaining firm in its opposition to Mr. Keiley's reception, and, meanwhile, he had arrested his journey and sojourned in Paris, until he finally, and for the second time, tendered his resignation, and was provided with a post on the International Court in Egypt, a place where the rules of diplomatic etiquette could not follow him. The government of the United States showed its resentment by leaving the legation at Vienna in charge of a secretary for some time afterwards.[1]

One more instance may be cited to illustrate the

[1] For official correspondence, see Senate Ex. Doc. 4, 49th Cong., 1st Sess. After a long and honorable service on the Egyptian International Court, Mr. Keiley lost his life in Paris in 1905, by being run over by an automobile.

grounds of objection advanced for the rejection of a minister. Hon. Henry W. Blair, on the expiration of a long term of service in the Senate of the United States, was appointed by President Harrison in 1891 minister to China, was confirmed by the Senate, and he set out for his post at Peking. Meanwhile, the newspapers had published extracts from the debates in the Senate, showing that Mr. Blair had compared the coming of Chinese laborers to the United States to the introduction of yellow fever, and contended that their exclusion was the exercise of a similar "power by which we exclude by national force pestilential diseases from any portion of the country;" and had referred to the Chinese of San Francisco as "the seeds of death, unless the upas plant could be rooted up and extirpated."

The Chinese government, upon being informed of these publications, instructed its minister in Washington to say to the secretary of state that as Mr. Blair "had bitterly abused China in the Senate, . . . and was conspicuous in helping to pass the oppressive exclusion act," his coming as minister "might be detrimental to the intercourse of the two nations;" and to request that some *persona grata* be appointed in his stead. The acting secretary of state insisted with the Chinese minister that the newspaper publication had done Mr. Blair injustice, as he had shown himself friendly to the Chinese people and government, notwithstanding he had voted for the law excluding Chinese laborers, and asked that his government would suspend its decision until an opportunity could be afforded to make this clear.

This request was cabled to Peking, but the answer was returned that though it was possible that some of the newspaper reports had been erroneous, it was an undoubted fact that Mr. Blair had voted for the law known as the Scott exclusion act, which openly violated an existing treaty, and was passed at a time when new negotiations were in progress; and that the state of feeling in China was so bitter it would not be advisable to receive Mr. Blair as minister. It was added that "the Chinese government has always been anxious to preserve the very best and friendliest relations with the United States, and has always tried to treat its ministers with the greatest consideration and confidence, and it will be very sorry if its conduct in this matter is not agreeable to the President." Mr. Blair was recalled before he had sailed from the Pacific port, and resigned his commission, although contending that he had been misrepresented and was the victim of a personal conspiracy.[1]

The appointments to the diplomatic service of the United States are by the Constitution vested in the President, by and with the advice and consent of the Senate. Before the adoption of the Constitution the choice of foreign ministers was made by the Continental Congress, and the election sometimes occasioned long and earnest contests; for instance, the balloting which resulted in the selection of John Adams as commissioner to negotiate peace with Great Britain occupied two sittings of Congress. In the first Congress under the Constitution a question was raised whether or not the

[1] For correspondence, Senate Ex. Doc. 98, 52d Cong., 1st Sess.

nominations of the President should be communicated orally, and the advice and consent of the Senate thereto be given in the presence of the President, but this method was never followed.

Justice Story records that in 1813 the Senate appointed a committee to hold a conference with President Madison respecting his nomination of a minister to Sweden, then before it for confirmation. But he declined it, considering that it was incompatible with the due relations between the executive and other departments of the government. It is, however, not unusual for the President, upon receiving an intimation that the Senate is opposed to a nomination, to withdraw the same from the Senate.

Another question early mooted was whether or not under the Constitution the Senate possessed the right to negative the *grade* of a diplomatic nomination as well as the *person* named. Mr. Jefferson was of the opinion that the Senate had no such right. In the early history of the country the appropriations by Congress for the diplomatic service were for a lump sum, and the President determined the grade and salary of the representatives sent to the various nations with which we maintained diplomatic intercourse; and it does not appear that the Senate ever questioned his action in this respect. But later the diplomatic appropriation bills fixed both the grade and the salary, and this practice has been uniformly followed for many years.[1]

[1] The first appropriation act of Congress to meet the expense of our foreign intercourse, that of July 1, 1790, was as follows: —

"That the President of the United States shall be, and is hereby

The posts of ambassadors and ministers to the leading nations stand in political signification next in importance and honor to the cabinet places, and the selections are made matter of careful examination by the President and secretary of state, and are often the subject of cabinet consideration before the nominations are sent to the Senate. The action of President John Adams in sending in the nomination of a minister to France, after diplomatic relations had been broken off, without consulting his cabinet, was severely criticised, and caused a serious breach with his party.[1]

Unlike its action upon treaties, the confirmation of a diplomatic appointment is made upon a majority vote of the Senate. Diplomatic officials are sometimes appointed during the recess of the Senate, in which case the appointee usually goes without delay to his post, and the nomination is sent to the Senate when it next assembles. In rare instances the nomination has failed of confirmation, which works the recall of the appointee. The most notable instances of this character are the appointments of Messrs. Gallatin and Van Buren.

Albert Gallatin, while holding the post of secretary of the treasury, was appointed by President Madison, in 1813, jointly with John Quincy Adams and James

authorized to draw from the treasury of the United States a sum not exceeding forty thousand dollars annually, to be paid out of the monies arising from the duties on imports and tonnage, for the support of such persons as he shall commission to serve the United States in foreign parts, and for the expense incident to the business in which they may be employed." . . .

The growth of the service may be seen from the amount carried in the diplomatic and consular appropriation for the year 1906, to wit, $2,950,000.

[1] Nomination of Vans Murray, Foster's American Diplomacy, 178.

A. Bayard, a commissioner to negotiate at St. Petersburg a treaty of peace with Great Britain and a commercial treaty with Russia. He was given a leave of absence from the treasury, repaired to St. Petersburg, and entered upon the negotiations. When the Senate convened the nomination of the commissioners was submitted for confirmation, and after debate Messrs. Adams and Bayard were confirmed and Mr. Gallatin was rejected. The ground for this action was that, while still holding the office of secretary of the treasury, he could not accept another appointment, although personal partisanship entered largely into the opposition. Mr. Gallatin soon after resigned the treasury portfolio, and was nominated and confirmed one of the commissioners to negotiate peace with Great Britain. He afterwards held the missions to France and to Great Britain.[1]

Following the break-up in the first cabinet of President Jackson in 1831, Martin Van Buren, secretary of state, was appointed minister to Great Britain during the recess of the Senate. On reassembling the nomination was sent to that body for confirmation, Mr. Van Buren having already entered on his duties in London. The nomination occasioned a lengthy and acrimonious debate, inspired in part by the cabinet dissensions; but the main ground of opposition was the charge that when secretary of state, Mr. Van Buren had given an instruction to the American minister in London to communicate statements to the British foreign secretary of an improper character relative to domestic politics. The nomination was rejected, but Mr. Van Buren returned

[1] Life of Albert Gallatin, by Henry Adams (1879), 483 ff.

home to receive the plaudits of his party and to succeed his chief as President of the United States.[1]

The laws of the United States forbid the appointment of any one other than a citizen of the United States in its diplomatic service. It is also a rule of the Department of State that no citizen of the United States shall be received by it as the diplomatic representative of a foreign government, but this rule is of a flexible character in its application. Anson Burlingame, who for some years had acted as the American minister in China, resigned to accept from the Chinese government the post of special ambassador to the United States and certain European governments. He was received as such in Washington, and Secretary Fish negotiated with him and his colleagues an important treaty.

Mr. Camacho, a native of Venezuela but a naturalized citizen of the United States, was accepted as minister from Venezuela in 1880, on renewal of relations with that country, which had been for some time suspended.[2] On the other hand, General O'Bierne, a prominent citizen of New York, was accredited as diplomatic representative of the Transvaal Republic to the United States at the outbreak of hostilities with Great Britain; and the secretary of state, applying the rule, declined to receive him on the ground of his American citizenship, thus avoiding the question of the reception of a representative of a country which the British government claimed was a suzerain state.

[1] Martin Van Buren (in Statesmen Series), by Edward M. Shepard, 187, 195; 1 Benton's Thirty Years in the Senate, ch. 59.

[2] 1 Wharton's Digest, 628.

In late years a practice grew up of securing the insertion in the "Diplomatic List," published monthly by the State Department, of the names of resident attorneys of Washington as counselors of certain legations of the less important countries. The main object of such insertion was to secure thereby invitations for the persons named and their wives to the receptions and teas given at the White House. When the attention of Secretary Root was called to the practice he directed it to be discontinued, basing his action on the rule above cited, that an American citizen could not be clothed with a diplomatic character in a foreign legation in Washington.

An envoy receives notice from the secretary of state of his appointment after confirmation by the Senate, when he is expected to signify his acceptance, execute the oath of office and forward it to the Department of State. He is then allowed by law not exceeding thirty days under pay to arrange his private affairs and receive his instructions. The latter are sometimes sent to him in writing by mail, when the appointee is absent from the country or other satisfactory reasons exist. But usually he is expected to come to Washington for personal conference with the secretary of state and to examine the correspondence in the department relative to the subjects and questions pending in the mission. This visit also affords him an opportunity to make the acquaintance of the resident envoy of the country to which he is to be accredited, as well as to offer his respects to the President, a duty which the envoys of all governments pay to the head of the state on accepting

office. This ceremony of visiting the head of the state is termed in England "Kissing hands."

Before the departure for his post an envoy is furnished his credentials or letters of credence, signed by the President, attested by the secretary of state, with the great seal attached, and addressed to the sovereign or chief of the state to which he is accredited, and he is also supplied an "office copy" of the same. It will be of interest in this connection to reproduce the first letter of credence ever issued by the government of the United States to a regularly accredited minister plenipotentiary — that of Benjamin Franklin to the court of France. The last paragraph is substantially the phraseology used at the present day for similar letters.

GREAT, FAITHFUL AND BELOVED FRIEND AND ALLY.

The Principles of Equality and Reciprocity on which you have entered into Treaties with us, give you an additional security for that good Faith with which we shall observe them from motives of Honour and of affection to your Majesty. The distinguished part you have taken in the support of the Liberties and Independence of these States cannot but inspire them with the most ardent wishes for the Interest and the Glory of France.

We have nominated Benjamin Franklin, Esquire, to reside at your court, in quality of our Minister Plenipotentiary, that he may give you more particular assurances of the grateful sentiments which you have excited in us and in each of the United States. We beseech you to give entire credit to everything which he shall deliver on our Part, especially when he shall assure you

of the Permanency of our Friendship and we pray God that he will keep your Majesty our great, faithful and beloved Friend and Ally in his most holy Protection.

Done at Philadelphia the twenty-first day of October, 1778.

By the Congress of the United States of North America, your good Friends and Allies,

HENRY LAURENS,
President.

Attest: CHAS. THOMPSON, Sec.

To our Great, faithful and beloved Friend and Ally Louis the Sixteenth, King of France and Navarre.

In addition to his letter of credence, the envoy is also given such written instructions as are called for by the business of the mission, and the usual Printed Instructions of the department to diplomatic officers, containing minute details as to the duties of the office, as well as a special passport for himself, his family, and his suite.

Under the early practice of the government a minister was allowed on his appointment a special sum for his "outfit," as well as his "infit;" but this has long since been abolished by Congress, because of its abuse,[1]

[1] "In September, 1829, John Randolph of Virginia was offered and accepted the mission to Russia; he sailed in June, 1830; remained ten days at his post; then passed near a year in England; and, returning home in October, 1831, drew $21,407 from the government, with which he paid off his old British debt. This act of Roman virtue, worthy of the satire of Juvenal, still stands as the most flagrant bit of diplomatic jobbery in the annals of the United States government." — Life of John Randolph (American Statesmen Series), by Henry Adams, 296.

and his only compensation is his salary, which begins thirty days before his departure from the country. He is limited by the Printed Instructions in the time which he shall occupy in going to his post, but this "traveling time" is arranged upon a liberal scale, as, for instance, there is allowed to make the journey to London twenty days, Vienna thirty days, Constantinople forty, Japan forty, and China sixty.

His legation is advised of the date of his expected arrival, and the local government, upon being informed, extends to him and his suite the proper courtesies, including the free dispatch at the custom house of his personal effects without examination. If required en route to pass through a country other than the one to which he is accredited, an envoy is accorded free passage and custom-house courtesies, but this is regarded as a matter of comity and not of right. If the country through which he is to pass is at war, it can prescribe the route which he must take.

The case of Mr. Soulé, American minister to Spain, illustrates the limitations under which the privilege of free transit may sometimes be exercised. Mr. Soulé, born in France but a naturalized citizen of Louisiana, being of a fiery temperament, soon after his arrival in Madrid took affront at the conduct of the French ambassador, which resulted in two duels, one between Soulé's son and the Duke of Alva, the brother-in-law of the Emperor Napoleon III, and the other between Soulé and the French ambassador. After these events, in 1854, the American minister, under orders from Washington, spent two weeks in Paris, and went thence

to London for conference with the American minister. While returning to his post he was met at Calais by the commissioner of police, and told that he "would not be allowed to penetrate into France without the knowledge of the government of the Emperor," and the police commissioner immediately communicated with Paris for further instructions. Mr. Soulé refused to remain in Calais, but returned at once to England, telling the police officer "that he did not expect any regard on the part of the French government, and that, besides, he did not care for it."

The American minister at Paris complained to the French government of this action, and received an answer that the government recognized the privilege of an envoy of the United States to traverse French territory in order to repair to his post, but that Mr. Soulé's antecedents awakened the attention of the authorities "whose duty it is to preserve public order amongst us;" that if he was going direct to Madrid, the route by France was open to him, but that the privilege of remaining in Paris would not be accorded to him. The French government was informed that Mr. Soulé had no intention of remaining in France. He resumed his journey, passing through Paris en route to Madrid, and the incident was ended. It simply afforded Louis Napoleon the opportunity and gratification of manifesting his hostility towards an intemperate diplomatist.[1]

[1] Senate Ex. Doc. 1, 33d Cong., 2d Sess. 22–28.

CHAPTER IV

THE RECEPTION OF ENVOYS

The American diplomatic representative goes to his post with no display, and much as a private gentleman makes a visit abroad. In this respect a great change has taken place in modern times. When Sully, the minister of King Henry of Navarre, went on his mission to Queen Elizabeth, he took to England a retinue of two hundred gentlemen. Ambassador Bassompierre speaks of an "equipage of five hundred" returning with him to France. When Sully reached London, he was saluted with three thousand guns from the Tower. D'Estrades, ambassador of Louis XIV, reports that he was met at Ryswick by the deputies of Holland with a train of three-score coaches-and-six.

While this extravagant display has given place in the western nations to more official simplicity, the old diplomatic order of things still lingers in the Far East. When the Viceroy Li Hung Chang went to Japan in 1895 to sue for peace, two merchant steamers were chartered to carry his suite of one hundred and thirty-five persons and their paraphernalia. The Japanese embassy which visited Peking in 1905, to negotiate for an adjustment of the questions growing out of the Russo-Japanese war, was attended with great state. The ambassador and his suite, whenever they moved about,

were accompanied by a large and imposing escort, and the ceremonial observed was studiously planned to impress the Chinese. On their departure they bestowed liberal gifts of money upon various local institutions, and traveled by special railway train with a military guard.

When the American envoy arrives at his post, his first duty is to put himself in communication with the secretary for foreign affairs. His predecessor should, under ordinary circumstances, remain till his arrival, and facilitate his induction into office, but in his absence the secretary of legation, acting as *chargé ad interim*, arranges for a personal call at the foreign office to pay his respects to the secretary or minister for foreign affairs, and express his desire to present his letter of credence to the head of the state; but he will also send the secretary a formal note asking for such audience, and inclosing an "office copy" of his credentials. If it is customary at the capital to exchange formal addresses at the audience, the new envoy will also inclose with his note a copy of his remarks; and when advised by the secretary's note in reply of the time of audience, a copy of the sovereign's address is inclosed.

The government of each country prescribes the ceremonial to be observed at the audience for the delivery of the envoy's credentials, and there is no uniformity even in the courts of Europe. In most countries greater display is made in the reception of ambassadors than of representatives of a lower grade. In all the capitals of Europe there is an official, often a nobleman of high

rank, variously entitled the grand chamberlain, introducer of ambassadors, or master of ceremonies, with a bureau of assistants and clerks, a part of whose business it is to take charge of the ceremony of the reception of envoys, and in other ways to assist them in the duties incident to their installation in the diplomatic body.

It is to him the new envoy applies after his reception to ascertain the officials of the government upon whom he must call, to learn the peculiar customs of the diplomatic body and of society at that court, and this functionary is expected to solve such momentous questions as the order of seating at the envoy's table, or the proper persons to be invited to his balls or other entertainments. The new diplomats coming to Washington have often felt the need of such an official, and even the resident people of society would be grateful to the government if it would provide them some authorized person who could solve for them the many vexed questions of precedence which are continually arising. The subject of a code of official precedence has often been considered at the Department of State, but as yet no secretary of state has had the courage, in the face of the conflicting claims, to issue such a code of rules.

When the time for the new envoy's reception is determined, he is waited upon by the master of ceremonies to explain the formalities to be observed, and on the appointed day he, or some official representing him, calls at the hotel or residence of the envoy with one or more state carriages to conduct him and his suite to the palace. In some countries the minister is allowed to go,

unescorted, in his own carriage. If the envoy has the rank of ambassador, he is usually escorted by a detachment of cavalry, and the carriages which take him and his suite are drawn by six horses.

This latter distinction is among the last reminders of the great displays formerly made at court in honor of ambassadors. Most of these have fallen into disuse with the increasing demand of the present age for greater simplicity, but several of the courts of Europe still cling to the six-horse ambassadorial coach. In the accounts of the great Congress of Westphalia and other conferences of two centuries and more ago, we read of the great number of coaches-and-six which were a part of the paraphernalia of the respective ambassadors, the plenipotentiaries of the king of France, for instance, explaining the delay in their arrival by the necessity of stopping en route to secure the proper number of suitable horses for their cavalcade of entrance.

As stated, the ceremony at the reception of an envoy is regulated in each country by its government, and there is no uniformity of custom. For instance, in Madrid, where ancient usage is still observed, the introducer of ambassadors escorts the envoy with his suite to the palace with state carriages and a troop of cavalry, and leads them up the grand stairway lined with halberdiers into the throne room, where is the sovereign surrounded by the cabinet and royal household officials in full uniform. When the doors of the throne room are opened, the envoy makes a bow at the entrance, then advances half-way to the royal circle, halts and bows again, then approaches near to the sovereign,

stops, bows a third time and proceeds with his address. When that is concluded, the envoy delivers the letter of credence of the President into the hands of the sovereign, who passes it without breaking the seal to the minister of foreign affairs, and the sovereign reads his address in reply. After a few minutes of informal conversation, the audience closes with the withdrawal of the envoy and suite, always with their faces to the royal circle, and a return down the grand stairway to the coaches and through the streets, accompanied by the introducer of ambassadors and the cavalry troop.

Hannibal Hamlin, that stout "Old Roman," who during his active political life had given little attention to society refinements, when he retired from the Senate was appointed minister to Spain to round out his public services. He anticipated the ceremonial of his reception by King Alfonso with considerable trepidation, and it is said he practiced with the trained secretary of legation the manner of his appearance before his majesty, with "the three reverences" in the throne room. In a letter to his sons, after describing the manner in which he was escorted to the palace, he says: "I think you would have laughed heartily to have seen your plain republican father toted along with all those trappings of royalty. But then it was all in accordance with established custom and had to be performed. There was nothing for me to do but submit, look on, and reflect, as you may be sure I did." He closed a detailed account of the reception as follows: "I believe I made no mistake or blunder. Mr. R., the secretary, complimented me on the manner in which I went through the ceremony. On the whole, I

was glad when it was over."[1] As might be anticipated, a single season at the court satisfied him, he resigned his commission, and returned to the more simple life of his own country.

The "three reverences," however, are not so severe a test of one's dexterity as that of conforming to the court requirement of retiring from the presentation with the face always turned to the royal presence, as was demonstrated by my own experience. After my audience of the Emperor Alexander II, I was received, according to custom, by the Cesarevitch (Alexander III) and by the Cesarevena (now Empress Dowager Dagmar) in the long hall of the Anitchkoff Palace. After a very pleasant interview I took leave of them and began my backward retirement to the other end of the hall, with my face fixed upon the Grand Ducal party, who stood watching my retrogression and to receive my farewell bow as I made my exit from the door. On reaching the latter without overturning any of the furniture, I seized with my hand at my back one of the knobs of the double door, but it would not yield to my pressure, but simply turned round and round. Presence of mind left me in my perplexity, but the amused Cesarevitch, seeing the cause of my embarrassment, shouted out in good English reverberating through the long hall: "Mr. Foster, take the other knob!" The door then yielded to my touch, and in much confusion I bowed myself out of the imperial presence.

Contrasted with the envoy's reception in Spain, in the great Empire of Russia the ceremony as to ministers is

[1] Life and Times of Hannibal Hamlin, 562.

much more simple. The envoy usually goes to the palace alone, is met there by the grand master of ceremonies and by him accompanied to the emperor, who receives him in his room, where he is left alone with his majesty. No addresses are made, but after a few words the emperor usually asks him to be seated, when a short informal conversation follows. If, however, as is often the case, the emperor is absent from the capital, at one of his country palaces, the envoy is accompanied by the grand master of ceremonies, or his assistant, in an imperial railway carriage, and is lodged and entertained in the palace.

The establishment of the ambassadorial rank for and in the United States seems to have caused a recrudescence of the ancient diplomatic ceremonial which had become obsolete and regarded as unfitted to our practical age. The great honors shown to the American ambassador on his reception by King Edward VII in 1905 appear to have surpassed in splendor any others of recent years. The reception about the same time of the new American ambassador to Russia was even more resplendent, which, the press reports say, revived the Old World pomp and ceremony observed at the court of the Romanoffs. Having journeyed to Tsarskoe Selo in an imperial train, the ambassador and his suite were met at the station by the grand master of ceremonies and a number of court officials. Four golden state carriages were in waiting, the one occupied by the ambassador and master of ceremonies being drawn by six white stallions, with grooms and footmen in the imperial scarlet livery and with outriders on either side.

Arriving at the Alexander Palace, the minister of foreign affairs, surrounded by the court officials in blazing uniforms, greeted the party. The ambassador was first presented to the empress mother, to whom he presented the embassy staff. Then, preceded by the master of ceremonies, bearing his staff of office, and a solemn procession of court functionaries, the ambassador passed through several saloons to the emperor's private apartments. Here the imperial bodyguard saluted. In the library the procession halted, and the doors of the private reception room were thrown open by the emperor's picturesque turbaned mamelukes, and as the representative of the President advanced to meet the emperor and empress, the doors closed upon them. The private audience lasted ten minutes. The report ends with the statement that the occasion marked a notable departure from the custom of the St. Petersburg court.

It appears that our neighboring republic has also caught the contagion of welcoming the "new world power" into the ambassadorial rank with royal pomp, and in the recent reception of Ambassador Conger the government of Mexico sought to vie with the monarchies in tinsel and display. The procession from the ambassador's hotel to the National Palace, with a great array of the military, is described as very brilliant. At one end of the ambassadors' hall the president and his cabinet stood, supported by an array of officers in military uniform. At the other end of the hall entered the ambassador between the general chief of the palace and the introducer of ambassadors, followed by his secretaries.

The report says that in advancing between the lane of officers the ambassador and his companion made the customary three bows, which were returned by the president and his ministers. The secretary for foreign affairs advanced several yards into the body of the hall to meet the ambassador and invited him to approach within the cabinet semicircle. At this point the ambassador made his final bow, "which was low and ceremonious," and then delivered his credentials and his address.

In the United States the foreign envoy goes in his own carriage with his suite to the Department of State, whence he is accompanied by the secretary of state without display to the White House and into the Blue Room, where he is left while the secretary of state goes to notify the President of his arrival. The latter enters with the secretary, the envoy is introduced and at once proceeds to read his address, which is replied to by the President, the letter of credence is received by the President and handed to the secretary of state, and after a brief informal conversation the reception ends. Since the establishment of embassies the above practice has been modified by the sending of a member of the President's military staff in one of his carriages, with a cavalry escort, to bring the ambassador to the White House. It seems that a further innovation has been made, as the secretaries of war and the navy, when they make their calls upon the foreign ambassadors, are accompanied by their military aides in uniform.

The ceremony already described of the Spanish court is that most nearly observed at foreign capitals, and is

usually highly appreciated by diplomats. The comment of John Quincy Adams, after passing one of these ceremonies, is as follows: "The formalities of these court presentations are so trifling and insignificant in themselves, and so important in the eyes of princes and courtiers, that they are much more embarrassing to an American than business of real importance. It is not safe or prudent to despise them, nor practicable for a person of rational understanding to value them."

Mr. Rush, the American minister at London, who had been attorney-general and acting secretary of state at Washington, after passing his presentation audience of the Prince Regent in 1818, which he evidently approached with misgivings, thus moralizes upon it in his Diary: "A competent knowledge of the world may guide any one in the common walks of life; more especially if he carry with him the cardinal maxim of good-breeding in all countries — a wish to please and an unwillingness to offend. But even in private society, there are rules not to be known but by experience; and if those differ in different places, I could not feel insensible to the approach of an occasion so new. My first desire was, not to fail in the public duties of my mission. The next, to pass properly through the scenes of official and personal ceremony to which it exposed me. At the head of them was my introduction to the sovereign. . . . The external observances — what were they? They defy exact definition beforehand, and I had never seen them."

After describing the ceremonies through which he had just passed, he writes: "I may have dwelled on

them the longer because they were new to me. I do not discuss their importance. I give them as facts. The philosopher may rail at them; but, in his philosophy, he may discover, if candid, matters for railing too. In the machinery of political or social life, the smallest parts are often those that give impulse to the greatest movements. . . . It may be thought that the forms I detail are the growth only of monarchical soils. Their roots lie deeper. If none but republics existed, other forms would arise, differing in circumstance, but not in essence." [1]

It will be of interest to read the account which our first minister to Great Britain, John Adams, gave in his report to Mr. Jay, Secretary of Foreign Affairs, of his presentation and delivery of credentials to King George III in 1785: "The master of ceremonies attended me in the ante-chamber while the secretary of state went to take the commands of his Majesty. While I stood in this place, where, it seems, all ministers stand upon such occasions, always attended by the master of ceremonies, the room very full of ministers of state, bishops, and all other sorts of courtiers, as well as the next room, which is the King's bed chamber, you may well suppose I was the focus of all eyes. I was relieved from the embarrassment of it by the Swedish and Dutch ministers, who came to me and entertained me with a very agreeable conversation the whole time. Some other gentlemen, whom I had seen before, also came to make their compliments to me, till the Marquis of Caermarthen

[1] Residence at the Court of London, by Richard Rush, edition 1872, 81, 93.

returned to me and desired me to go with him to his Majesty. I went with his lordship through the levee room into the King's closet. The door was shut, and I was left with his Majesty and the secretary alone. I made the three reverences, one at the door, another about half-way, and the third before the presence, according to the usage established at this and all the northern courts of Europe, and then addressed myself to his Majesty in the following words: —

"'Sire, — The United States of America have appointed me their minister plenipotentiary to your Majesty, and have directed me to deliver to your Majesty this letter which contains the evidence of it. It is in obedience to their express commands, that I have the honor to assure your Majesty of their unanimous disposition and desire to cultivate the most friendly and liberal intercourse between your Majesty's subjects and their citizens, and of their best wishes for your Majesty's health and happiness, and for that of your royal family. The appointment of a minister from the United States to your Majesty's Court will form an epoch in the history of England and of America. I think myself more fortunate than all my fellow-citizens, in having the distinguished honor to be the first to stand in your Majesty's royal presence in a diplomatic character; and I shall esteem myself the happiest of men, if I can be instrumental in recommending my country more and more to your Majesty's royal benevolence, and of restoring an entire esteem, confidence, and affection, or, in better words, the good old nature and the good old humor between people, who, though separated by an

ocean, and under different governments, have the same language, a similar religion, and kindred blood.

"'I beg your Majesty's permission to add, that, although I have some time before been intrusted by my country, it was never in my whole life in a manner so agreeable to myself.'

"The King listened to every word I said, with dignity, but an apparent emotion. Whether it was the nature of the interview, or whether it was my visible agitation, for I felt more than I did or could express, that touched him, I cannot say. But he was much affected, and answered me with more tremor than I had spoken with, and said: —

"'Sir, — The circumstances of this audience are so extraordinary, the language you have now held is so extremely proper, and the feelings you have discovered so justly adapted to the occasion, that I must say that I do not only receive with pleasure the assurance of the friendly dispositions of the United States, but that I am very glad the choice has fallen upon you to be their minister. I wish you, sir, to believe, and that it may be understood in America, that I have done nothing in the late contest but what I thought myself bound to do, by the duty which I owed to my people. I will be very frank with you. I was the last to consent to the separation; but the separation having been made, and having become inevitable, I have always said, as I say now, that I would be the first to meet the friendship of the United States as an independent power. The moment I see such sentiments and language as yours prevail, and a disposition to give to this country the

preference, that moment I shall say, let the circumstances of language, religion, and blood have their natural and full effect.' "

After reporting some informal conversation, Mr. Adams wrote: "The King then turned round and bowed to me, as is customary with all kings and princes when they give the signal to retire. I retreated, stepping backward, as is the etiquette, and, making my last reverence at the door of the chamber, I went my way. The master of ceremonies joined me the moment of my coming out of the King's closet, and accompanied me through the apartments down to my carriage, several stages of servants, gentlemen-porters, and under-porters, roaring out like thunder, as I went along, 'Mr. Adams's servants, Mr. Adams's carriage, &c.' I have been thus minute, as it may be useful to others hereafter to know." [1]

The presentation a few years later of his credentials by James Monroe as minister to France was quite in contrast to that of Mr. Adams. He was received by the National Convention in open session, the president of that body welcoming him upon the platform with an embrace, and addresses were exchanged amid great applause.[2]

Much trouble has been occasioned to foreign governments in their diplomatic intercourse with China because of the oriental customs adhered to by the court of that country. Early in the nineteenth century Lord Amherst, a British ambassador, reached Peking with

[1] 8 Works of John Adams (1853), 256.

[2] For detailed account, Foster's American Diplomacy, 172.

an imposing suite, but because of his refusal to perform the *kotou* or kow-tow, by personal prostration at the feet of the emperor, his mission completely failed. Napoleon severely criticised the conduct of Lord Amherst, stating that envoys ought to accept the etiquette of the court to which they are accredited. The first American minister to reach Peking, Mr. Ward, in 1859, failed in his mission for similar reasons. Not until after the Boxer uprising and the siege of the legations in 1900 was the last vestige of oriental diplomatic intercourse swept away.

One of the provisions of the protocol entered into with the Chinese government by the American and other ministers in 1901 was that a member of the imperial family should make an expiatory journey as an ambassador to Berlin, and express to the emperor of Germany the regrets of the emperor of China for the assassination of the German minister during the Boxer outbreak. When the ambassador reached the German frontier, he was notified that he would be expected, on appearing in the presence of the emperor of Germany, to make the same *kotou* or prostration as would be performed by him in the presence of his own emperor. This he declined to do, and, after some parleying, he was received at Berlin with the same ceremonies — the three bows — as at the presentation of a German plenipotentiary at Peking.

Our minister at London narrates the visit in 1857 of Siamese commissioners to Queen Victoria, bearing presents from the king of Siam. On being introduced to

[1] American Diplomacy in the Orient, John W. Foster, 24, 249, 269.

her presence, seated on her throne, to the surprise of the attendant courtiers, the commissioners fell in a group upon their faces, crawled on all fours to the foot of the throne, and there delivered the presents.[1]

The date of reception of credentials regulates the order of standing or precedence of envoys of the same rank at the capital where they are stationed, the one newly received going to the foot of the list. After the passage of the statute of 1893, authorizing ambassadors in the United States diplomatic service, it was determined by the leading powers of Europe to raise their ministers in Washington to the rank of ambassadors, and there occurred a quiet struggle for the first presentation of such credentials, as that act would make the deliverer of them the head or dean of the local diplomatic corps. The French government first nominated its minister an ambassador, and was soon followed by the British government. The London foreign office was, however, more prompt in forwarding the queen's letter of credence, and her majesty's minister was enabled to deliver it into the hands of the President before his French colleague was received, and therefore the British ambassador became the dean of the diplomatic corps and took rank next after the President and Vice-President.

The practice in monarchical governments of accrediting anew their diplomatic representatives on the accession of every new ruler has occasioned some question as to the relative precedence of envoys. Between 1870 and 1874 various changes of rulers occurred in Spain.

[1] Letters from London by George M. Dallas, 356.

On the accession of King Alphonso the British minister was and for some time had been the oldest resident minister, but, the ministers of Portugal and Russia having presented their new credentials to the king before their British colleague, they claimed precedence over him. After much discussion, it was decided that foreign ministers preserve their relative precedence according to the date of their official notification of their first arrival, without regard to the order in which they may afterwards deliver fresh credentials on the occasion of a new sovereign. Such was the view taken by the American minister, Mr. Cushing, and it was approved by his government.[1]

Following his reception, the American envoy has a round of official visits to make. If accredited to a royal court, there are usually certain presentations to be made to the heir apparent and other members of the royal family, and these are arranged through the master of ceremonies. This official also furnishes him a list of the higher members of the government upon whom the envoy is expected to make the first call. He likewise makes the first call upon his colleagues of the diplomatic corps. If of the grade of minister, he cannot call upon the ambassadors except by appointment, which is usually made upon written application. Even a new ambassador has a certain formality to observe, which is not very clearly defined, as was shown in the case of the newly created ambassador of Mexico, whose ambassadorial colleagues declined to accept an invitation to his embassy because of the omission of some not very well

[1] U. S. For. Rel. 1875, 1105, 1108.

understood formality; although it is possible they took that method of exhibiting their displeasure at the creation of an embassy by Mexico, it being felt by them that ambassadorial distinction should be reserved for the Great Powers of Europe.

An early duty of an American envoy after his arrival is to find a location for his office and residence. These are usually combined in the same building, although in a few capitals, as London, Paris, and Berlin, offices are provided separate from the residence. Our government makes no provision for residences for its diplomatic representatives, and this omission is a source of great embarrassment to the newly arrived envoy, and in a lesser degree to those who have relations with him, as a change in the location of the legation usually occurs with the arrival of every new minister. The desirability of having the legation residences owned by the government has often been urged upon Congress, and the secretaries of state have collected information as to their cost and importance, but thus far Congress has not thought proper to authorize the appropriation necessary to this new dignity and usefulness of its foreign representation. It has, however, been found necessary for the government to erect and own legation houses in China, Japan, Korea, and Siam, owing to the fact that it was not possible to rent suitable legation residences in those countries.

The practice of owning their own legations is observed by a number of the nations of the world. Legation houses are now owned in Washington by the following governments: Great Britain, Germany, Mexico,

Austria, Italy, Japan, China, and Korea, and the number is likely to be increased.

A curious incident of congressional legislation is connected with this subject. Yielding to the demand for some restraint upon the extensive ownership of lands in the West by foreign syndicates and corporations, an act was passed in 1887 restricting the ownership of real estate in the Territories to American citizens. It was not intended to have it apply to legation property in Washington, but its language operated to that end, and it became necessary to pass an act the following year so amending the law as not to apply to the ownership of legations in the District of Columbia.

CHAPTER V

DUTIES OF A DIPLOMAT — TO HIS OWN GOVERNMENT

The duties of a diplomatic representative may be divided into two general classifications: first, to his own government and its citizens; second, to the government of his residence and its people.

It is, as a matter of course, the duty of the envoy to keep his own government informed of the state and progress of all business intrusted to him by it, or which may arise in the regular course of affairs; but in addition to this, he is to keep it informed of all that occurs in the country of his residence affecting the government of the latter, its policy and spirit, whether it has relation to his own or other countries; and the general sentiment of the country, its commercial, industrial, and scientific development.

An envoy can hardly be too diligent in attention to these duties, but one occasionally oversteps the proper limits of desired information. A minister going to his post in South America, having never before been out of his own country, sent back to the Department of State a detailed account of his journey, in which he described in such florid language the beauties of the scenery and the experiences of foreign travel to him so novel, that when the dispatch appeared in the annual publication of the department it exposed him to the

ridicule and criticism of the press. One of the ministers to a European court was so fascinated by the attentions of royalty that he furnished the secretary of state with a description of a state ball, of which the most conspicuous and important event was the honor conferred upon him and his country by his dancing with her majesty the queen. Its publication furnished the topic of a spirited discussion in the lower house of Congress, in which the usefulness of the diplomatic service was treated with irony and contempt.

The envoy, in assuming the duties of his office, receives from his predecessor the archives and property of the embassy or legation, of which a schedule is furnished him and for which he gives a receipt These comprise the record books and correspondence of his office, the cipher of the department, the legation seal, the government stationery and blanks, the library (consisting of the laws of the United States, diplomatic correspondence, text-books on international law, supreme court reports, and official and miscellaneous publications), and other property, such as office furniture, flags, shield, etc.

Explicit directions are given in the Printed Instructions of the Department of State respecting the record books and official correspondence, and the duties of the envoy concerning them, and it suffices to refer to that publication for details. A few technical terms may be mentioned. The official communications of the department to the envoy are styled "Instructions," and his communications to the department are termed "Dispatches." The communications sent by the envoy to the foreign office of the country to which he is accredited and its

communications to him are called "Notes." In the past these have been accustomed to be written in a somewhat stilted style with the use of the third person, but the practice of the secretaries of state in the use of the first person is less formal, and has modified to some extent the ancient usage. Of this method John Quincy Adams, when secretary of state, made the following comment in his diary: "There is one difference in the correspondence of all the foreign ministers here from that which is usual in Europe — they write letters instead of notes, in the first person instead of the third. The effect of this difference upon style is greater than any one not habituated to both modes would imagine. The third person, 'The undersigned,' is stiff, cold, formal, and dignified; it is negotiation in Court dress, bag wig, sword by side, chapeau de bras, white silk stockings, and patent shoe-buckles. Letters in the first person are negotiations in frock coat, pantaloons, half-boots, and a round hat."[1]

Among the duties of an American envoy is that of issuing passports to his countrymen. An American passport expires by limitation two years from its date of issue, and citizens traveling or residing abroad often require to have their passports renewed. The only officials in foreign lands authorized to do this are the heads of missions. The duty often presents perplexing questions as to citizenship. Americans residing abroad are required, in order to secure a passport, to make oath that they intend to return to the United States within a specified date, with the purpose of residing and

[1] 4 J. Q. Adams's Memoirs, 327.

performing the duties of citizenship there. For many such Americans the oath is quite embarrassing. It also presents to the ambassador or minister a difficult question for solution. Many Americans reside abroad as the agents or representatives of American commerce or industries, and others for health, study, or pleasure. Where such persons are native born citizens, it is usually easy to determine whether they still remain *bona fide* Americans.

In the issuance of passports, the chief trouble arises in the application of naturalized citizens, who, after having secured citizenship, in many cases return to the country of their nativity with the apparent intention of permanent residence. The records of the Department of State show that a large percentage of naturalized citizens who apply for passports to go abroad are naturalized within six months of the date of their application. The instructions of the secretary of state leave to the heads of missions a large discretion as to the rejection of applications.[1]

The imperfections which exist in the naturalization laws are in large measure responsible for the abuse of citizenship so frequently seen in Europe. The necessity of a reform in the existing laws has been repeatedly brought to the attention of Congress. President Grant, in a message calling attention to the impositions practiced on our citizenship by those of alien birth, said: "They reside permanently away from the United States; they contribute nothing to its revenues; they avoid their duties of citizenship; and they only make themselves

[1] Circular as to Passports, March 27, 1899, U. S. For. Rel. 1902, 1.

known by a claim for protection."[1] The revision of the naturalization laws has recently been made the subject of careful study by an official committee of experts, and their report resulted in the passage by the Fifty-ninth Congress of a law which is designed to effect radical reform in the naturalization of aliens. Provision is made for a record to be kept in the Department of Commerce and Labor at Washington of the issuance of all certificates of naturalization, and stricter rules as to naturalization are enacted, among which is the requirement of being able to speak the English language. It is provided that if naturalized persons take permanent residence abroad, it shall be considered *prima facie* evidence of a lack of intention to become a permanent citizen, and, in the absence of countervailing evidence, authorizes the courts to cancel the certificate of citizenship. It is also made the duty of diplomatic and consular officers to report from time to time to the Department of Justice the names of such persons residing in their districts, with a view to the cancellation of their citizenship.[2]

The matter of the extradition of criminals or fugitives from justice often demands the attention of ambassadors and ministers. It is through them that the demand for extradition is made upon the country of refuge. They likewise have certain duties to discharge in connection with the demand of foreign governments for extradition from the United States. These duties

[1] 7 Messages and Papers of the Presidents (1896), 36.

[2] Law of Congress, approved June 29, 1906. See Citizenship in the United States, Frederick Van Dyne.

are sometimes of a delicate character and require legal knowledge or counsel.[1]

In no branch of international intercourse has the growth of comity and friendly reciprocity been more conspicuous than in this matter of the mutual extradition of criminals. With Great Britain our intercourse is more intimate than that with any other nation, but not until nine years after our independence was recognized, was a treaty stipulation as to extradition agreed upon, and it embraced only two crimes. The second treaty was negotiated by Secretary Webster in 1842, and it provided for extradition for seven offenses. The number of offenses for which extradition is now enforced numbers twenty-five, and includes practically the entire list of acts generally recognized as crimes.

Complaints of a varied character against the treatment of local officials are made by Americans. These usually fall within the province of the consul, at least in the first instance; but they often call for the interposition of the diplomatic representative. The cases which most frequently require the attention of the latter are those of naturalized Americans who return to the country of their birth and are subjected to various exactions from the authorities, such as a demand for military service, or other undischarged obligations incident to nativity.

The protection of American citizens abroad has well been stated by Secretary Hay, in a communication to Congress, to be one of the most important of the duties

[1] For extradition questions, A Treatise on Extradition and Interstate Rendition, by John Bassett Moore.

of our diplomats. As has been seen, in cases where citizenship has been abused, it becomes their duty to refuse the protection demanded, and this has in some cases occasioned the criticism not infrequently heard that the American government and its representatives do not afford such adequate guardianship of its citizens abroad as is given, for instance, by the British government. I regard such criticisms as without foundation. The tendency of our representatives is to be too zealous rather than too indifferent, and no nation has been more prompt to respond to the just appeals of its citizens abroad than the United States. The noted cases of Martin Koszta in 1853, and of Ion Perdicaris in 1904, illustrate the extreme measures which will be adopted by the government for their protection.

In countries with which the United States has important trade relations, commercial questions are apt to occupy much of the time and study of the heads of missions. Import regulations, tariff discrimination, and the general commercial policy of the country are matters about which the diplomatic representative must keep his own government well informed, and respecting which he may have to make representations to the government to which he is accredited.

The use of the embassy or legation is sometimes asked to celebrate a marriage. The Printed Instructions of the department allow the ceremony to be performed, but it is made the duty of the diplomatic representative to ascertain whether the parties may lawfully marry according to the laws of the country; and whether the proper steps have been taken — facts which it is not always

easy to obtain with accuracy. The use of the legation does not add anything to the validity of the act.

Many Americans would make the embassies and legations "information bureaus" to meet their wants as sight-seers. Other visiting countrymen have large expectations as to the social attentions they will receive. Lord Palmerston, on being questioned by a Parliamentary committee as to the propriety of reducing the salaries of ambassadors, and whether that would not relieve them from extending such costly hospitalities to English visitors, replied that it would not, and that if they attempted it the English visitors "would reckon our ambassador a very stingy fellow, and would abuse him all over Europe." American diplomatists who have attempted to live on their meagre salaries have realized Lord Palmerston's prediction.

Presentations at court are the demands most difficult of compliance amongst the social duties of the American envoy. The plethora of applicants is greatest at the embassy in London,[1] but in other monarchical courts it is more or less embarrassing, as the invitations are very limited, and many American democrats must necessarily be disappointed in their royal aspirations. The limitation is especially depressing to American women who wish to have at least a glimpse of court life.

Charles Francis Adams, minister in London, wrote Secretary Seward, 1867: "Court attendance, with the annoyances resulting from numerous applicants for presentation, have always proved here the most annoying and irksome of my public duties."[2] Mr. Lowell, writing

[1] S. Ex. Doc. 68, 40th Cong., 1st Sess. [2] U. S. For. Rel. 1867, 117.

to his friend Thomas Bailey Aldrich, 1882, in a seeming fit of depression over his duties, says: "I am now in the midst of the highly important and engrossing business of arranging for the presentation at Court of some of our fair *citoyennes*. Whatever else you are, never be a Minister."[1]

From the foregoing hasty sketch of the duties of the diplomat in the details of his office work, in the demands of his government, and the calls made upon him by his countrymen, it is seen that no American minister need find his post an idle one. Said Mr. Wheaton: "Nothing vexes me more than to hear an American minister say, whatever the court may be to which he is accredited, 'There is nothing to do here,' or 'Nothing *can* be done.' I do not know a post, whether important or not, which could not afford a zealous, active, and skillful agent the opportunity of doing something for the interests of his country."[2]

The statutes do not permit a minister to be absent under pay from his post for more than ten days without permission of the department, but it is lawful for the department to allow him annually a leave of absence under pay for not exceeding sixty days. If the leave includes permission to visit the United States, the usual traveling time going and coming is added to the sixty days.

The American minister in foreign countries is sometimes called upon to act in concert with a commander of our naval forces. While in cases of emergency or

[1] 2 Letters of James Russell Lowell (1894), 268.

[2] Henry Wheaton, May 15, 1836, in Lawrence's Commentaire, 83.

threatened danger to American interests the naval officer is instructed to put himself in communication with the diplomatic representative of the country, he does not thereby come under his orders. The naval officer receives his instructions only through the secretary of the navy. While there should exist a good understanding and harmony of action, both occupy a position independent of each other.[1]

At the very beginning of the life of the nation it was found that American diplomats could not always live in harmony with each other. The relations of Messrs. Adams, Lee, and Izard with Dr. Franklin at Paris have shown that petty jealousies and interference of one with the duties of another lead to recrimination and public scandal. The government of the United States has been as fortunate in escaping such controversies as most nations, but they have been sufficiently frequent to call for an executive order from the President requiring that no diplomatic and consular officer shall attack or publicly criticise any other officer in either service, but that all such charges shall be communicated confidentially to the Department of State.[2] A recent violation of this order led to the dismissal from the service of one minister accredited to Venezuela and the censure of his predecessor.

The proper designation of the embassies, legations, and consulates of the United States of America has been sought to be fixed by a circular of the secretary of state,

[1] For controversies between diplomatic and naval officers, see Foster's American Diplomacy in the Orient, 206.

[2] Executive Order, April 25, 1902, U. S. For. Rel. 1902, 5.

in order to secure uniformity in use. It is directed that in correspondence and in printing, and in seals for the diplomatic and consular service, the adjective used shall be "American" instead of "United States." As, however, the designation in the laws of the United States authorizing notarial service is "The United States of America," that term will be used as heretofore when officers act in that capacity.[1]

In this connection it may be useful to examine the mooted question of the number of the verb or pronoun to be used in connection with the phrase "United States" when referred to as the body politic or the Federal Union. On the one hand, it is contended that when followed by a verb or when indicated by a pronoun, it should always be in the plural number. On the contrary, it is claimed that, as the phrase is descriptive of a political entity or one nation, it should be treated as a collective noun in the singular number.

The strongest reason in support of the first contention is that our organic code, the Federal Constitution, always treats the United States in the plural number. In considering the phraseology of the Constitution of the United States, we are to bear in mind the time and circumstances under which that instrument was written. The delegates to the convention which framed the first organic code of this nation came together as the representatives of thirteen independent States, which had formed a coalition or league against the mother country, but had not as yet permanently parted with any portion of their sovereignty, and still possessed and

[1] Circular of August 3, 1904, U. S. For. Rel. 1904, 7.

exercised the right to make their own war levies, to impose their own taxes and customs duties, and to regulate foreign commerce. In editing the Constitution which was to control the new government, it was natural that they should use the form of words to which they had been accustomed in the public documents of the Continental Congress and the States. It can hardly have been their intention to impose upon their descendants and successors through all time the necessary and invariable use of the same forms of expression as were employed by them. We venerate John Wicklif, but we prefer the Bible in more modern English than is found in his version. We honor Chaucer as the father of English literature, but our poets no longer use the form of words in which he wrote.

If we examine the language of the Constitution, it will be seen that in other respects than as to the phrase "United States" we have departed from the custom of the fathers of our government. In Article I, Section 2, Clause 5, we read, "The House of Representatives shall chuse their Speaker," etc.; in the same article, Section 3, Clause 5, "The Senate shall chuse their other officers," etc.; in Section 4, Clause 2, "The Congress shall assemble . . . unless they shall," etc. We no longer write "chuse," and we seldom, in referring to the House of Representatives, the Senate, or Congress, use the words "they" or "their." A learned lawyer has publicly cited Article III, Section 2, "The judicial power shall extend . . . to controversies to which the United States shall be a party," as evidence that even the authors themselves of the Constitution were not

uniform in the use of the plural in connection with the "United States." An examination of our fundamental code also shows that in the original and official copy all the nouns are capitalized.

It thus appears that in neither typography, orthography, etymology, nor syntax do we of the present day uniformly follow the original text of the Constitution. If we are permitted without criticism to write the nouns of that instrument without capitals, to modify the spelling of words, and to change the number of collective nouns other than "United States," we should likewise be permitted to follow the modern practice as to the latter phrase, unless a matter of principle compels the contrary use. The fact that the plural use of the verb occurs in the Constitution in connection with that phrase is not of itself a controlling reason. It must have a deeper cause. Is it found in the fact that this nation is made up of a collection of States, and that they cannot be ignored in the use of the phrase? It is naturally suggested that an event occurred in the sixties which relieved our language from that servitude.

I do not, however, think that that event was the only, or the controlling, reason why the use of the singular verb is permissible, and even more proper. The oneness of our government was proclaimed long before the first shot was fired at the flag over Sumter. Probably the one member of the convention of 1787 who best comprehended the significance of the work of that body was James Wilson of Pennsylvania, and he declared in the debates that "by adopting this Constitution we shall become a Nation." In "The Federalist," although

"United States" several times appears in the plural, the most common expression is "the Union," "the Republic," and "America." And an examination of the writings and speeches of Hamilton, Jefferson, Clay, Webster, and of other statesmen of the period before our Civil War, will show that while with the phrase "United States" they usually felt bound to couple a plural verb or pronoun, they were constantly striving to avoid it, as if conscious of the incongruity, by the use of some other phrase, as "the Union," "the Republic," "the Government of the United States," recognizing that we had ceased to be a league of States and had become a nation, a single political entity, in our relations with the world.

The reason which has largely controlled the use of the plural verb with "United States" is one of euphony. It seems more natural and euphonic to couple with this phrase "have" or "were," rather than "has" or "was." In public documents, such as the Presidents' messages, I find a number of examples where both the singular and plural forms are used in the same paper, and sometimes in the same sentence. For instance, Secretary Bayard: "The United States have no reason to believe that any discrimination against its citizens is intended." As the writer gets away from the phrase in the plural form he escapes the euphonic influence, and recurs to the true significance of the words.

I think an additional reason may be found for the growing use of the singular verb and pronoun. It has been the prevailing practice to refer to Great Britain, France, Germany, and other nations as in the feminine

gender, growing out of the fact of their feminine form in the Latin language, — Britannia, Gallia, Germania, etc., — and it thus became common to treat the names of all nationalities as feminine. Calhoun, for example, says, "Great Britain herself," "Texas herself." But to speak of the United States as "she" does more violence to our sense of euphony than "it;" hence of late years we have gradually drifted into the custom of adopting the neuter "it," which makes necessary the use of the singular verb.

If it must be an invariable rule to use the plural verb, we encounter frequent incongruities. We should be compelled to say that in the Franco-German war "the United States were a neutral." We could not properly say, "the United States were neutrals," because in our relations with foreign governments we appear only as a single, indivisible power. Even all the writers who employ the plural verb use "United States" and "nation" interchangeably. Of the war with Spain we should have to say, "the United States were a belligerent," as there were only two belligerents in the contest. It would not much improve the sentence to say, "the United States were one of the two belligerents."

The result of a somewhat cursory examination of the treatment of "United States" by our public men and official bodies may be found curious, if not decisive of the proper or permissive use of the verb and pronoun in connection with that phrase. It is found that in the earlier days of the republic the prevailing practice was the use of the plural, but even then many public men at times employed the singular. Among statesmen who have

used the singular form may be cited Hamilton, Webster, Silas Wright, Benton, Schurz, Edmunds, Depew; of our secretaries of state, Jefferson, Marcy, Seward, Fish, Evarts, Blaine, Frelinghuysen, Bayard, Gresham, Olney, Hay, and Root; among diplomats, Motley, C. F. Adams, E. J. Phelps, Choate, and Reid; professors of international law and lawyers, Woolsey of Yale, Moore of Columbia, Huffcut of Cornell, and James C. Carter of New York. In the earlier messages of the Presidents the use of the singular verb is seldom found, Jackson's being the only one noted; but in later years it appears in those of Lincoln, Grant, Cleveland, Harrison, McKinley, and Roosevelt. Messages of the last four are found in which the singular verb alone is used throughout the message in connection with "United States."

The decisions of the Supreme Court in the earlier years rarely show the use of the singular, but several cases have been found, and in later years its use has been growing much more frequent. For example, in a recent decision (La Abra Company *vs.* United States, 175 U. S. 423), "United States" occurs no less than seven times in connection with a singular verb or pronoun, and no use is made of the plural. There is, however, no uniformity in the court, each member of it following his individual custom. For instance, in two decisions rendered at the October term, 1905, written by different justices, one used the singular and the other the plural form.[1]

In no class of public documents is greater attention paid to the language employed than in the drafting of

[1] Russian American Co. *vs.* United States, 199 U. S. 578; Hill *vs.* American Surety Co. 200 U. S. 203.

treaties. Until recent years, in these documents the phrase "United States" was almost invariably coupled with a plural verb. This was the case, for instance, in the treaty of peace with Great Britain of 1814, and with Mexico of 1848. But in the treaty of peace with Spain of 1898, the term "United States" is uniformly treated in the singular. As indicating the growing tendency in this direction, it may be mentioned that the fur-seal arbitration treaty of 1892 used the "United States" in the singular, as also the modus vivendi with Great Britain of the same year. In the Olney-Pauncefote arbitration convention of 1897, the "high contracting parties" was the term used to describe the two countries, but Secretary Olney, in the correspondence which accompanied the negotiation, always referred to the "United States" in the singular. The Hay-Pauncefote canal convention of 1900 also treats "United States" as a singular noun; and since that date such has been the uniform practice of the Department of State.

The result of my examination is that, while the earlier practice in referring to the "United States" usually followed the formula of the Constitution, our public men of the highest authority gave their countenance, by occasional use, to the singular verb and pronoun; that since the Civil War the tendency has been toward such use; and that to-day among public and professional men it has become the prevailing practice.

An improvement in the correspondence of the Department of State with its diplomatic representatives abroad has been frequently suggested, but has never been made. It is of course the practice to keep the repre-

sentative fully informed of all matters directly affecting the duties of his own mission, but he is often without official intelligence as to the instructions given to other American representatives at even nearby posts, and respecting matters of general foreign policy advocated by the home government; whereas a knowledge of such instructions or policy might make him of much more service to his country in his mission. When the matter was urged upon Secretary Webster he recognized the desirability of the innovation, but he said the difficulty he found in carrying it into effect was in the great labor it must throw upon somebody in the department already overtaxed. This difficulty might be readily overcome by a small increase in the appropriation for the department, but Congress has thus far not seen proper to vote the necessary sum.

The necessity for an increase of appropriations by Congress for salaries of diplomatic officers and the other expenses of maintaining their missions has been a fruitful topic of discussion from the foundation of the government, and was never more earnestly urged upon popular attention than to-day. Hence it calls for some consideration here.

It is a curious fact that in the early period after the establishment of embassies it was the practice for the government to which the ambassador was accredited to defray his expenses. For instance, we have the record that the court of Vienna in 1679 appropriated a sum equal to $2000 a week to meet the expenses of a Russian embassy, and to the Turkish embassy something over $1000. A century later the Turkish embassy at

the same court cost the latter 2000 rubles daily. The papal legate at Paris in 1625 cost the king of France 2500 livres daily. The celebrated Lord Macartney British embassy to China is said to have cost the Chinese government the equivalent of $850,000.

But in the course of time these splendid and extravagant expenditures became both burdensome to the court which furnished them and humiliating to the representatives of the country receiving them, and it came to be the practice of each government to defray the expenses of its own mission; but it was assumed that this should be done on a scale befitting the dignity and standing of the nation, and most governments have sought to keep this standard in view in making their appropriations for the diplomatic service.

An envoy who is sent abroad to represent his country ought not to be expected to maintain a more expensive establishment than is warranted by the salary paid him, and yet every American minister accredited to the leading capitals of Europe, who in any degree meets the expectations of his countrymen, spends annually more than he receives from the national treasury. This fact has been the source of criticism on and appeals to Congress ever since the organization of the government. Jefferson, when minister to France, represented both to the Continental Congress and to his friends that he could not live on his salary, and suggested a more liberal appropriation. To Mr. Jay, secretary for foreign affairs, he wrote as follows: "It is a usage here (and I suppose at all courts) that a minister resident shall establish his house in the first instance. If this is done out

of his salary he will be a twelfth month absent without a copper to live on. It is the universal practice, therefore, of all nations to allow the outfit as a separate article from the salary. I have inquired into the usual amount of it. I find the sovereign sometimes pays the actual cost of it. In other instances they give a service of plate and a fixed sum for all other articles, which fixed sum is in no case lower than a year's salary. I desire no service of plate, having no ambition for splendor. My furniture, carriage, and apparel are all plain, yet they have cost me more than a year's salary."[1]

The elder Adams in 1785 complained to Congress that the salary of his posts both at The Hague and in London did not enable him to make a decent appearance at court and in society. From Holland John Adams wrote: "How are we to do? We are to negotiate with all the ambassadors here, that is, we are to be invited to dine to-morrow at a table with three thousand pounds sterling upon it, and next day we are to return this civility by inviting the same company to dine with us upon earthenware. I am well aware of the motives of Congress, which are virtuous and laudable, but we shall find that we cannot keep up our reputation in Europe by such means, where there is no idea of the motives and principles of it, and where extreme parsimony is not economy. We have never been allowed anything to furnish our houses or tables, and my double capacities have obliged me to furnish myself, both in Holland and France, which, besides exposing me to be unmercifully

[1] 2 U. S. Diplomatic Correspondence (1783–89), 161.

robbed and plundered in my absence, has pinched and straitened me confoundedly."[1]

The same complaint of parsimony in Congress has continued through the entire existence of the nation. The younger Adams in 1815 reported from the London court to the secretary of state "that the annual salary of an American minister is insufficient to support a man with a family — I say not in the style of high official rank, but in the decency becoming a private gentleman."

William Pinkney, who preceded Mr. Adams, a gentleman of high reputation in diplomacy, as cabinet minister, and as the acknowledged leader of the bar of his day, after a four years' residence at London, in a letter to President Madison, begging to be relieved of the mission, wrote: "Upon a recent inspection of my private affairs, it appears that my pecuniary means are more completely exhausted than I had supposed, and that to be honest I must hasten home.

"The compensation (as it is oddly called) allotted by the Government to the maintenance of its representative abroad is a pittance, which no economy, however rigid, or even mean, can render adequate. It never was adequate I should think; but it is now (especially in London) far short of that just indemnity for unavoidable expenses which every government, no matter what its form, owes to its servants.

"I have in fact been a constant and progressive loser, and at length am incapable of supplying the deficiencies of the public allowance. These deficiencies have been

[1] 9 John Adams's Works, 525.

hitherto supplied by the sacrifice of my own capital in America, or by my credit, already pushed as far as the remnant of that capital will justify and I fear somewhat farther. I cannot, as an honorable man, with my eyes open to my situation, push it farther, and of course I must retire."[1]

The testimony of our representatives at London in later years has been that the situation had become much more aggravated with the increasing cost of living. In response to a circular inquiry sent to ministers abroad, in 1851, by Secretary Webster with a view to submitting to Congress the necessity of an increase in salaries, Abbott Lawrence, a man of wealth, filling the mission at London, reported: "You are perhaps aware that possessing private means, I have not been as exact in my expenses as I should have been had I been obliged to measure them by the amount of my outfit and salary." He then proceeded to give the cost of living, and states that even with economy the salary was entirely inadequate, and that his expenses largely exceeded it.

To the same circular William C. Rives, a distinguished citizen of Virginia, minister to France, replied: "The burden becomes insupportable to any but a man of very large private fortune, to which class few of our public men in America belong, and to which it is certainly not the policy of our institutions to *confine* the performance of high public trusts."[2]

James Monroe, minister abroad, secretary of state, and President, urged upon Congress a more liberal scale

[1] Wheaton's Life of Pinkney, 105, 106.

[2] S. Ex. Doc. No. 93, 32d Cong., 1st Sess.

of appropriations for the diplomatic service, with statements such as the following: "A minister can be useful only by filling his place with credit in the diplomatic corps, and in the corresponding circle of society in the country in which he resides, which is the best in every country. By taking the proper ground, if he possesses the proper qualifications, and is furnished with adequate means, he will become acquainted with all that passes, and from the highest and most authentic sources. . . . Deprive him of the necessary means to sustain this ground, separate him from the circle to which he belongs, and he is reduced to a cipher." [1]

Mr. Livingston, secretary of state under President Jackson, urged upon Congress similar action. "If," he argued, "none of the ministers we have sent abroad, however prudent, have been able to live on the salaries that are allowed them, the conclusion is inevitable that the salaries ought to be increased, or the ministers should be recalled. If the mission is useful, it ought to be supported at the public, not private expense, and the representative of a great nation ought not to be obliged to employ, in devising parsimonious expedients for their support, that time and those talents which ought to be occupied in the service of their country." [2]

Similar views might be quoted from Clay, Webster, and various Presidents and secretaries in later years, showing that the sentiment of those best qualified to judge was and is that the scale of appropriations for our diplomatic service has been inadequate to its require-

[1] Annals of Congress, 14th Cong., 1st Sess., 1735.
[2] H. R. Ex. Doc. 94, 22d Cong., 2d Sess.

ments. But so far from Congress being influenced by these considerations, it has, as we have seen, authorized a higher rank for certain of our envoys abroad, largely increasing their expenditures without adding to their salaries, notwithstanding that the secretary of state had advised Congress that such action would be a great injustice to them. A comparison of the allowances made by other governments to their diplomatic representatives at the capitals of Europe to which American ambassadors are now accredited will show that they are from two to three times as great as those received by the latter.

As a complement to the citations already made from our own public men on the subject of salaries, I desire to quote once more from a competent British authority, Lord Palmerston, from whose testimony before the Parliamentary committee the following extract is made: —

"In order to preserve good relations with a country, it is not sufficient simply to have a person living in town as cheaply as he can afford to exist, because the social position of your representative is a very important element in his power to be useful. In regard to his intercourse with the ministers of the country, great facilities and great means of good understanding are afforded by easy social intercourse, which can only possibly be obtained by his being able to receive them, as well as also being received by them. Again, it is of great importance that your ambassador should be in habits of social intercourse with public men not in office; that he should have the means of receiving them, becoming acquainted

with their views, and explaining to them the views and policy of his own country. Therefore, I think it is of great importance to this country that your representative should be in such an easy position with regard to money affairs as may enable him to receive hospitably persons of all kinds, and I may say also of different nations." [1]

In his testimony before this committee Lord Palmerston stated that the salary of the British ambassador in Paris was not sufficient to meet the outlay actually made by him. And yet the salary and allowances of the British ambassador are more than three times as great as those received by the American ambassador in that capital. I have been informed on the best authority that when the post of British ambassador in Paris became vacant a few years ago by the retirement of Lord Dufferin, it was offered in succession to three British statesmen of prominence, who declined the honor on the ground that they could not afford the extra expense that would necessarily have to be met from their private purse.

The great expense has debarred many prominent Americans from accepting diplomatic posts. Mr. Calhoun, in 1819, was offered the mission at Paris, but he answered that he was well aware that a familiar practical acquaintance with Europe was indispensable to complete the education of an American statesman, and regretted that his fortune would not bear the cost of it. Again, in 1845, he was tendered the mission to England, but declined for the same reason. George William Curtis,

[1] S. Ex. Doc. 93, 32d Cong., 1st Sess. 8.

Senator Hoar, and other able and cultured public men have likewise been forced to decline our highest diplomatic posts.

This fact may suggest the inquiry whether the style of living of ambassadors and the demands made upon them have not exceeded the proper bounds, and whether there is not some force in the argument used to justify Congress in its course, that it is not becoming to our democratic representatives abroad to seek to rival the representatives of royalty in an ostentatious and extravagant style of living. It is also due the government of the United States to state that there are occasions on which the extra expenses of its diplomatic officials are met by special appropriations, as, for instance, at the grand ceremony of the coronation of the Czar of Russia at Moscow, a few years ago, the expenses of the legation in installing itself in a house and entertaining during that event were provided by our government.

Mr. Jefferson during his presidency offered General Armstrong the mission to France, to succeed Chancellor Livingstone, who had tendered his resignation. Anticipating an objection which the General might raise, he wrote him: "You have doubtless heard of the complaints of our foreign ministers as to the incompetence of their salaries. I believe it would be better were they somewhat enlarged. Yet a moment's reflection will satisfy you that a man may live in any country on any scale he pleases. From an ambassador there a certain degree of representation is expected. But the lower grades of envoy, minister resident, and chargé have been introduced to accommodate both the sovereign and

minister as to the scale of expense. When I was in Paris two thirds of the diplomatic men of the second and third orders entertained nobody. Yet they were as much invited out and honored as those of the same grade who entertained. I suspect from what I hear that the Chancellor, having always stood on a line with those of the first expense here, has not had resolution enough to yield place there, and that he has taken up the ambassadorial scale of expense. This procures one some sunshine friends who like to eat of your good things, but has no effect on the men of real business, the only men of real use to you, in a place where every man is estimated at what he really is."[1]

Unfortunately, Mr. Jefferson when in Paris did just what he condemned in Chancellor Livingston, and it is understood that he laid there the foundation of his later financial misfortunes. Nevertheless, the views expressed in the foregoing extract are well founded, and emphasize the fact that too much importance has been attached to social display in the diplomatic service. A palace, uniformed lackeys, and extravagant entertainments add little to the accomplishments of a weak and unskillful representative. Social courtesies may smooth the way of the able diplomatist, but they are far from being the most important of the elements which make his services useful to his government.

Congress has shown an indisposition to make any material increase in the salaries of our foreign represent-

[1] 8 The Writings of Thomas Jefferson, edited by Paul Leicester Ford, 302.

atives, but there is a measure which it might well adopt which would bring great relief to the service. I have already referred to the great embarrassment to the American representative going abroad for the first time to enter upon his duties, to find that his first task is to search for a suitable house in which to install himself. The proposition has frequently been made to Congress to purchase or lease permanent residences for our diplomatic representatives. President Cleveland was especially urgent in bringing this subject to the attention of Congress, in two successive messages, and Secretary Olney submitted to that body a special communication embodying the reports of our ministers abroad as to the cost of such residences. From one of Mr. Cleveland's messages I make the following extract: —

"I am thoroughly convinced that in addition to their salaries our ambassadors and ministers at foreign courts should be provided by the government with official residences. The salaries of these officers are comparatively small and, in most cases, insufficient to pay, with other necessary expenses, the cost of maintaining household establishments in keeping with their important and delicate functions. The usefulness of a nation's diplomatic representative undeniably depends, to a great extent, upon the appropriateness of his surroundings, and a country like ours, while avoiding unnecessary glitter and show, should be certain that it does not suffer in its relations with foreign nations through parsimony and shabbiness in its diplomatic outfit. These considerations, and the other advantages of having fixed and somewhat

permanent locations for our embassies, would abundantly justify the moderate expenditure necessary to carry out this suggestion." [1]

If Congress would be as liberal with our foreign representatives as it has been in providing the two commodious and sumptuous palaces for the accommodation of its own members, our embassies and legations in the leading capitals in Europe could be supplied with permanent homes. If an appropriation cannot be obtained sufficient to purchase residences, it should be entirely feasible to secure an appropriation that would enable the secretary of state to lease for a term of years suitable houses in those and other prominent capitals. Such a course has been adopted by the government of Great Britain in a number of countries. If such residences should be leased and furnished, they would accomplish three much desired ends. First, they would constitute for American embassies and legations a permanent home, much to the relief of our representatives and to the convenience of all persons having business with them. Second, they would enable public men of moderate means to accept these posts. Third, they would prevent rich appointees from renting great palaces and making extravagant displays of wealth, very unseemly in republican representatives.

[1] 9 Presidents' Messages, 640, 723; U. S. For. Rel. xc; Sen. Doc. No. 128, 54th Cong., 2d Sess.

CHAPTER VI

DUTIES OF A DIPLOMAT — TO THE FOREIGN GOVERNMENT

We come now to consider the duties of the envoy having relation to the government of the country of his residence and its people; and it is in discharge of those duties that the skill, discretion, and tact of the diplomat are most brought into exercise.

There is no just foundation for the prevailing popular impression that diplomacy is somehow associated with deceit and cunning, and that practice in these artifices gives great advantage in international intercourse. The experienced British statesman, Lord Clarendon, on being asked if there was any special art required in diplomacy, replied: "No; I think the special art required is this — to be perfectly honest, truthful, and straightforward." An ex-diplomatist, who wrote a treatise suggested by his service, with dry witticism thus sums up the art: "Take snuff often and slowly, sit with your back to the light, and speak the truth; the rest you will learn by observing your older colleagues." Bernard well remarks that among the most distinguished names in diplomacy are those of men notoriously not only true but frank.

The standard of conduct for an American diplomatist was fixed by the first President of the United States in the instructions given by the secretary of state to Mr.

Jay, special minister to Great Britain in 1794; and it is a matter of just pride for the country that it has seldom been departed from by his successors. It was as follows: "It is the President's wish that the characteristics of an American minister should be marked on the one hand by a firmness against improper compliances, and on the other by sincerity, candor, truth, and prudence, and by a horror of finesse and chicane." [1] Secretary Hay in a public address declared the "Golden Rule" to be the cardinal principle of American diplomacy, and the enthusiasm with which his utterance was received proved its hearty indorsement by the American people. While it is perfectly true that frankness and straightforward action should mark the conduct of the diplomatist, if he meets the requirements of his position, he must exercise constant circumspection, and occasions will frequently arise when his ability and tact will be put to the test.

The first care of an envoy in his relation to his mission is to make himself *persona grata* at the foreign office, and at the court or in government circles. While a self-respecting minister will never play the part of a toady, he should strive to make himself personally popular by studying the amenities of official and social intercourse, and by conformity to all innocent local customs, sentiments, and even prejudices. It is in these relations that the importance is seen of sending abroad

[1] 1 American State Papers, For. Rel. 497.

"Diplomacy is like a midnight ghost; a menacing giant to the sight of those that fear it, it melts like a fine mist before those who resolutely go to meet it." — Mazzini to Victor Emmanuel, letter September 20, 1859.

not only men of ability but of gentlemanly accomplishments. A boor in manners, or one disagreeable instead of affable in his demeanor, can hardly expect to make himself popular in social circles, or even to be very successful in the dispatch of the business of his country.

Secretary Adams in his Diary gives his estimate of the qualities of a diplomat, in discussing the accomplishments of one of the British ministers at Washington during his incumbency of office, as follows: "Bagot is about thirty-five, tall, well-proportioned, and with a remarkably handsome face; perfectly well-bred, and of dignified and gentlemanly deportment. The principal feature of his character is discretion, one of the most indispensable qualities of a good negotiator; but neither his intellectual power nor his acquisitions are in any degree striking. His temper is serious, but cheerful. He has no depth of dissimulation, though enough to suppress his feelings, when it is for his interest to conceal them. He has resided here three years, and, though coming immediately after a war in which the national feelings here were highly exasperated against his country, has made himself universally acceptable. No English minister has ever been so popular; and the mediocrity of his talents has been one of the principal causes of his success. This is so obvious that it has staggered my belief in the universality of the maxim that men of the greatest talents ought to be sought out for diplomatic missions. Bagot has become a better minister than a much abler man would have been; better for the interests of England — better for the tranquillity of this country — better for the harmony between the two

nations, for his own quiet and for the comfort of those with whom he has had official intercourse here.

"For a negotiation that would require great energy of mind, activity of research, or fertility of expedients, such a man would not be competent; but to go through the ordinary routine of business and the common intercourse of society, to neutralize fretful passions and soothe prejudices, a man of good breeding, inoffensive manners, and courteous deportment is nearer to the true diplomatic standard than one with the genius of Shakespeare, the learning of Bentley, the philosophical penetration of Berkeley, or the wit of Swift." [1]

The relations of a resident envoy to the foreign office should be marked by the strictest conformity to the etiquette of that office. It is an established rule of the Department of State that all official business of foreign envoys should be transacted through the secretary of state, whether they relate to his or other branches of the government. Diplomats sometimes see other heads of departments informally about matters pending before them, but they never should do so without the consent of the secretary of state previously obtained; and a similar practice is observed by other governments.

John Quincy Adams, probably the highest American authority on diplomatic usage, held that no foreign minister had a right to take official notice of informal remarks made by the President at one of his "drawing-rooms," nor to speak or correspond with him about pending negotiations with the secretary of state.[2] This practice was established soon after the organization of

[1] 4 J. Q. Adams's Memoirs, 338. [2] Ib. 269.

the government. M. Moustier, French minister (1788–89), having quarreled with Secretary Jay, sought to carry on a correspondence with President Washington, but this the latter declined in a letter stating clearly the diplomatic usage.[1] A similar course had to be taken with the impetuous French minister of the Revolutionary Directory, M. Genet.

There prevails a theory that ambassadors, because of their supposed investiture of a special capacity to represent their sovereign or head of their state, have the right to demand an audience at any time with the chief of the nation to which they are accredited, and that such right does not pertain to diplomats of the next lower grade of ministers plenipotentiary. It is a theory which has come down from the mediæval period, but in modern times has become a pure fiction. Vattel says of ambassadors that their "representation is in reality of the same nature as that of the envoy" or minister plenipotentiary. Calvo, one of the highest living authorities on international law, referring to the claim that ambassadors "have a formal right of treating directly with the sovereign, of which the other ministers are deprived," says: "This is a distinction without a meaning, especially since the organization of modern nations no longer rests exclusively upon the monarchical principle, and therefore renders it impossible for sovereigns personally to conduct international negotiations. . . . In our eyes the agents of the first two classes are exactly on the same line from the point of view of their

[1] 11 The Writings of George Washington, edited by Worthington C. Ford (1889), 305.

character as of their duties and powers." Martens, an authority on diplomatic ceremonies and practice, writes: "Considered from the point of view of international law, all diplomatic agents, without regard to their class, are equal. This equality is shown by their all possessing, in a like degree, all diplomatic rights. . . . Many writers have tried to infer from the rules of Vienna that ambassadors, as representing the person of their sovereign, have, in distinction from other diplomatic agents, the formal right of treating with the sovereign to whom they are sent, and of being received in audience by him at any time. We cannot admit this inference. As Prince Bismarck opportunely remarked, no ambassador has a right to *demand* a personal interview with the sovereign. The constitutional government of west-European monarchies compels ambassadors to treat with the minister of foreign affairs." Lawrence (T. J.), one of the latest authors on international law, says: "Ambassadors, as representing the person of their sovereign, are held to possess a right of having personal interviews, whenever they choose to demand them, with the sovereign of the state to which they are accredited. But modern practice grants such interviews on suitable occasions to all representatives of foreign powers, whatever may be their rank in the diplomatic hierarchy. Moreover, the privilege can have no particular value, because the verbal statements of a monarch are not state acts. Formal and binding international negotiations can be conducted only through the minister of foreign affairs." [1]

[1] The Principles of International Law, T. J. Lawrence (1895), 263. Commenting on the practice which has recently grown up of the

The following incident, which attracted much comment at the time, illustrates the evil results of the practice of foreign representatives making verbal representations to the President. In 1857, when the relations between the two countries were strained on account of Central American affairs, Lord Napier, British minister in Washington, sought an interview with President Buchanan, and made certain verbal representations to him as to the attitude of his government respecting the Clayton-Bulwer treaty. These representations constituted the basis of a message to Congress. Lord Napier, not being supported by his government in the views expressed, felt it necessary to make the interview the subject of an official communication to the secretary of state, alleging that it was unofficial and confidential,

ambassadors freely visiting the White House for conference with the President, Professor J. B. Moore, in his recent work, says : "Among the extraordinary privileges commonly said to belong to the ambassador, by reason of his representing the 'person' of the 'sovereign,' is that of personal audience on matters of business with the head of the state. In Europe, with the substitution of constitutional governments for absolute monarchies, this privilege has become merely nominal, but in Washington it has been revived in something like its pristine vigor, direct intercourse with the President, without regard to the Secretary of State, being constantly demanded and practiced. In the days when the highest rank was that of an envoy extraordinary and minister plenipotentiary, the privilege of transacting diplomatic business directly with the President was rarely accorded to a foreign minister, not only because the time of the President was supposed to be already sufficiently occupied, but also because the White House is not an office of record, the custodian of the diplomatic archives being the Secretary of State, who is the legal organ and adviser of the President in foreign affairs, and who, by reason of his preoccupation with the business of his own department, is supposed to possess that mastery of its details which is so essential to the care of public as well as of private interests." — American Diplomacy, its Spirit and Achievements, by John Bassett Moore (1905), 264.

and of such a spontaneous nature that it ought not to have been cited against his government, and had no binding official character; and he added that if he had been authorized to make an international declaration on so important a matter, he would have presented it "in writing in the usual manner." [1]

It is not permissible for a diplomatic representative to make complaint to the secretary of state of the discussion in Congress or to criticise the speeches of members. This was explicitly stated by Secretary Adams in a celebrated interview of a very animated character which he held with Sir Stratford Canning (afterwards Lord Stratford de Redcliffe), British minister. The following is an extract from Mr. Adams's Diary, giving a report of the heated interview: "With some abatement of the tone, but in the same peremptory manner, he said, 'Am I to understand that you refuse any further conference with me *on this* subject?'

"I said, 'No. But you will understand that I am not pleased either with the grounds upon which you have sought this conference, nor with the questions which you have seen fit to put to me. The only foundation upon which you rest your application is a remark made by a member of Congress in a debate, and a publication of another member of Congress in a newspaper. The members of the legislatures of this country are not only perfectly independent of the executive, but the executive cannot permit itself to be questioned by any foreign minister upon anything said or done by them. . . .

"'What would be thought of an American minister in

[1] British and Foreign State Papers, 1857, vol. 48, p. 651.

England who should presume to call upon the secretary of state for foreign affairs to account for speeches or writings of members and committees of Parliament?'

"He said he was much mistaken if, in the lately published correspondence respecting the slave trade, there had not been references by Mr. Rush [American minister in London] to speeches and proceedings in Parliament.

"Undoubtedly,' said I, 'Mr. Rush's dispatches to his own government; and we make no question of your right to report to your own government anything said or done in Congress by any of its members."[1]

The question of the right of a foreign minister to criticise or comment on legislation pending in Congress in his communications to the secretary of state was made the subject of discussion recently in Congress. The Chinese minister sent a note to Secretary of State Hay in 1902, in which he took exception to the proposed legislation respecting Chinese immigration, basing his action upon a provision of the treaty of 1880 which contemplated representations of a diplomatic character respecting Congressional legislation. Secretary Hay sent a copy of the minister's note to both houses of Congress. In the debate on the measure the attention of the Senate was called to the Chinese minister's note as a breach of the rule which forbids diplomatic discussion of pending legislation, but the prevailing sentiment seemed to be that the provision of the treaty justified the minister's conduct.[2]

[1] 5 J. Q. Adams's Memoirs, 245, 254.

[2] Congressional Record, Senate, April 12, 1902.

It is also held that the chief of the department for foreign affairs of the government to which an envoy is accredited may direct that certain specified questions shall be made the subject of written communications, and he may decline to hear verbal presentation of the same. This course was adopted by Mr. Canning, secretary for foreign affairs of Great Britain, towards the American minister, Mr. Pinkney, in 1808;[1] and by the secretary of state of the United States towards the British minister, Mr. Jackson, in 1806.[2] It was also indicated by Secretary Adams to Sir Stratford Canning, in the fiery interview from which an extract has already been made. From the body of this interview, as recorded in Mr. Adams's Diary, is taken the following:[3] "Without replying to this remark, having found the book, I resumed my seat, and, after reading audibly the article of the convention respecting the boundary, said, 'Now, sir, if you have any charge to make against the American government for a violation of this article, you will please to make the communication in writing.'

"He then said, with great vehemence, 'And do you suppose, sir, that I am to be dictated to in the manner in which I may think proper to communicate with the American government?'

"I answered, 'No, sir, we know very well what are the privileges of foreign ministers, and mean to respect them. But you will give us leave to determine what communications we will receive, and how we will re-

[1] 3 State Papers, For. Rel. 314. [2] Ib. 308.
[3] 5 J. Q. Adams's Memoirs, 244.

ceive them; and, you may be assured, we are as little disposed to submit to dictation as to exercise it.'

"He then, in a louder and more passionate tone of voice, said, 'And am I to understand that I am to be refused henceforth any conference with you on the business of my mission?'

"'Not at all, sir,' said I; 'my request is that if you have anything further to say to me *upon this subject*, you would say it in writing. And my motive is, to avoid what, both from the nature of the subject and from the manner in which you have thought proper to open it, I foresee will tend only to mutual irritation, and not to an amicable arrangement.'"

The participants in this spirited colloquy were the most distinguished diplomats of their respective countries during their generation, and it is interesting to have their estimates of each other. Mr. Adams wrote, while these sharp controversies were still fresh in his mind: "Mr. Canning . . . departs to-morrow. I shall probably see him no more. He is a proud, high tempered Englishman, of good, but not extraordinary parts; stubborn and punctilious, with a disposition to be overbearing, which I have often been compelled to check in its own way. He is, of all the foreign ministers with whom I have had occasion to treat, the man who has most severely tried my temper. Yet he has been long in the diplomatic career, and treated with governments of the most opposite characters. He has, however, a great respect for his word, and there is nothing false about him. This is an excellent quality for a negotiator. Mr. Canning is a man of forms, studious of courtesy,

and tenacious of private morals. As a diplomatic man, his great want is suppleness, and his great virtue is sincerity." [1]

Lord Stratford de Redcliffe (Mr. Canning), at the ripe old age of ninety-three, when time had obliterated the passions awakened by his stormy intercourse with the American secretary, wrote: "Mr. Adams was more commanding than attractive in personal appearance, much above par in ability, but having the air of a scholar rather than a statesman, a very uneven temper, a disposition at times well-meaning, a manner somewhat too often domineering, and an ambition causing unsteadiness in his political career. My private intercourse with him was not wanting in kindness on either side. The rough road was that of discussion on matters of business. . . . Under a waywardness on the surface there lay a fund of kindly and beneficent intentions which ought to go down the stream of time with the record of his life and characteristic qualities." [2]

The subsequent career of the two British diplomats — Bagot and Canning — confirmed Secretary Adams's estimate of their capabilities. Mr. Bagot was transferred from Washington to St. Petersburg, where he was assigned the important duty of negotiating with the Russian government a treaty to settle the marine and land questions on the northwest coast of America growing out of the Russian ukase of 1821. After dallying with the wily Muscovite diplomats for two years and

[1] 6 J. Q. Adams's Memoirs, 157.

[2] 1 The Life of Lord Stratford de Redcliffe, by Stanley Lane-Poole (1893), 308.

more without success, he was recalled by his government, and Sir Stratford Canning, who had succeeded him at Washington, was transferred to St. Petersburg. Within three weeks after his first interview with the Russian plenipotentiaries the desired treaty was signed. The event has a special interest for Americans, because it was this treaty which fixed the land boundary of Alaska, and out of which grew the controversy with Canada, settled by the London Boundary Tribunal of 1903.

Next in importance to a good standing at the foreign office is the establishment by the envoy of friendly social relations with official and private circles. Personal acquaintance with influential people in governmental and political life is often helpful in advancing business of the legation, and in enabling the minister to ascertain and communicate to the home government the true spirit and policy of the nation. None of our American diplomats have understood better or practiced more assiduously this duty than Franklin, who became the favorite guest of public and private entertainments, and was by no means neglectful of hospitality on his part. I do not go to the length of Palmerston, in his declaration that dining is the life and soul of diplomacy, but it plays no insignificant part in the career of the successful minister. It is, therefore, apparent that the establishment which an envoy maintains, or his manner of living, is an important matter for him.

The diplomatic representatives of the United States are forbidden by the Printed Instructions from publishing any of their correspondence with the foreign office,

or any official paper, without the express consent of the department; and the secretary of state has had occasion to severely criticise foreign ministers at Washington for making public their correspondence with him without the authority of their governments. Every government is the judge of the propriety of publication of the correspondence of its agents with a foreign government, but such publication, especially of matters relating to pending questions, is usually not made except by mutual agreement or on notice to the other power, and it is improper to publish a note or dispatch before it has been received by the other party.

It is the custom of the British foreign office to lay before Parliament the diplomatic correspondence on any particular subject, when called for or required by circumstances. Such is also the custom in the United States, but in addition to this there is annually issued one or more volumes, containing the correspondence exchanged with the legations which is deemed to be of public interest. This annual publication constitutes a continuous chronicle of our diplomatic relations so far as they may be made public, and is a valuable addition to the current history of the times. Care is exercised, in making the compilation, to omit any dispatches or portions thereof the publication of which might be objectionable, and in sending their dispatches ministers often mark such portions as confidential. But even with caution, matter appears sometimes which places the resident minister in very embarrassing relations with the government to which he is accredited.

A noted instance is that of Mr. Sargent, minister to

Germany, who wrote a dispatch to the department in 1883, on the subject of the prohibition of the importation of American pork into Germany, on the alleged ground of trichina infection. He mentioned the public declaration of the minister of the interior that the ordinance to that effect would soon be issued, and said that "the pretense of sanitary reasons is becoming the thinnest veil . . . and is now apparently only insisted on as an excuse to the United States." And elsewhere in the dispatch he exposed the insincerity of the government's published motives, closing with the declaration that "we cannot submit to the exclusion of our products upon false pretenses — pretenses so obviously false as in this instance."

The dispatch was published by the department in its commercial series, the subject being one of deep interest to the agricultural people of the United States. When its publication reached Germany, Mr. Sargent's comment was received by the government newspapers with a storm of indignation, and from that date he ceased to be *persona grata* in official circles. Soon thereafter an incident occurred which added fuel to the flames. Edward Lasker, a German statesman, member of the Reichstag, died in the United States in 1883, having during his visit been received by Congress. The House of Representatives passed a resolution of sympathy and requested that a copy be transmitted to the German Reichstag. The resolution was forwarded by the secretary of state to Mr. Sargent and by him sent to Prince Bismarck, chancellor and head of the foreign office. Bismarck, to whom Lasker had been an active antagonist, declined

to transmit the resolution to the Reichstag because, as he said, his "opinion of the deceased's politics and services differed from that of the enlightened House of Representatives."

The official press opened upon Sargent, as he reported, "with forked tongues of venom, simultaneously with the announcement of the fact that the chancellor had sent back the Lasker resolution," and they charged him "with ignorance of diplomatic usage." The semi-official press expressed wonder that he "did not vacate his place here to give way to one who is not so intimately associated with the political opponents of the government." The President offered to transfer him to St. Petersburg, but feeling that the department had done him a great injury by the indiscreet publication of his dispatch, he declined the post, resigned, and retired to private life.[1]

In view of inconveniences sometimes caused by the publication of the diplomatic volumes, it has been suggested that it would be better to omit altogether the annual volume, and follow the British practice of the occasional publication of special subjects when required. But in the present state of general intelligence among the people, it is not necessary to have many state secrets, because, as has been said, the general interests of nations thrive best in the daylight. It animates public spirit and invigorates a sense of duty. These annual publications, besides, serve a useful purpose in making accessible a continuous history of our diplomacy.

Referring to the practice of ministers marking their dispatches confidential or transmitting state secrets in

[1] MSS. Department of State, Germany, 1883–84.

private letters to the secretary of foreign affairs, it has been related of a celebrated French diplomatist that his papers were of four kinds: First, his dispatches to the ministers of foreign affairs, which might, if necessary, be communicated or published, showing how it was desirable that matters and transactions should appear; second, his confidential letters to the minister, showing how *he* wished matters to appear officially; third, his letters to an intimate friend, giving an unofficial view of affairs which he wished to be regarded as the true one; and, lastly, his diary, giving the naked facts and exact truth.

American diplomatic officers are prohibited by law from corresponding with any newspaper or with any person other than the proper officers of the United States in regard to the public affairs of any foreign government (R. S. sect. 1751), a prohibition which is sometimes transgressed to the discredit of the representative. Nor are they permitted to correspond with them as to matters which are or may be the subject of official correspondence with the government to which they are accredited. They are forbidden by the Printed Instructions to participate in any manner in the political concerns of the country of their residence; they are especially enjoined to refrain from public expression of opinion upon local politics, and from making reference to political issues pending in the United States and elsewhere; and they are advised not to make public addresses, unless upon exceptional festal occasions.[1] These official prohibitions and injunctions support the

[1] Printed Instructions, 26.

view that the less a diplomatic representative speaks in public, the better for his own reputation.

This is illustrated in the case of Mr. Bayard, ambassador to Great Britain, one of our most experienced public men, long a senator, and for four years secretary of state. He was called to account for two public addresses delivered in England in 1895. The press reported that at the town of Boston, in an after-dinner speech, he declared "that the President stood in the midst of a strong, self-confident, and oftentimes violent people; men who sought to have their own way. It took a real man to govern the people of the United States." At Edinburgh he delivered a written address before the Philosophical Institution, in the course of which, referring to the policy of protection in the United States, he said: "it has done more to corrupt public life, to banish men of independent mind and character from public councils, to lower the tone of national representation and blunt public conscience . . . than any other single cause. . . . It saps the popular conscience by schemes of corrupting favor and largesse to special classes, . . . and has done so much to throw legislation into the political market, where jobbers and chafferers take the place of statesmen."

The House of Representatives, controlled by an opposition majority, passed a resolution calling on the President to inform the house concerning the correctness of the speeches as reported, and what if any action on them had been taken by the Department of State. The President in reply transmitted copies of the speeches as communicated by Mr. Bayard, and stated that no action

had been taken on them by the department. Thereupon resolutions were introduced in the house, the first condemning Mr. Bayard for violating the rule of the department, and the second being as follows: —

"*Resolved*, That in the opinion of the House of Representatives public speeches by our diplomatic or consular officers abroad, which display partisanship or which condemn any political party or party policy or organization of citizens of the United States, are a dereliction of the duty of such officers, impair their usefulness as public servants, and diminish the confidence which they should always command at home and abroad."

The resolutions awakened a warm debate, in which Mr. Bayard was defended by his party adherents; both resolutions were adopted, the second by an overwhelming majority made up of both parties. It was regarded as a correct statement of the duty of a diplomatist.[1]

Mr. Bayard, in making the addresses for which he was censured, was only following the practice observed by many of his predecessors at the court of St. James. The same language, institutions, and history make it natural that American representatives to Great Britain should participate with their kinsmen in public celebrations, and their addresses have usually had a happy effect, but Mr. Bayard's experience warns them that they cannot be too circumspect in their utterances on such occasions.

[1] For addresses, see H. R. Ex. Doc. 152, 54th Cong., 1st Sess.; for debate and action of the house, Congressional Record, vol. 28, part 3, 2976; part 4, 3034 ff.

Until recent years it was not usual for foreign envoys at Washington to make public addresses. Of late it has grown quite common for them to deliver addresses before our educational institutions, scientific bodies, and other non-political assemblages. Such addresses are highly appreciated by our people, and tend to the promotion of better relations with the countries they represent.

Oratory, however, has not been regarded as an indispensable requisite to a successful diplomatic career. The first two accredited foreign representatives of the United States were Benjamin Franklin to France and John Adams to England. The latter was a famous orator, the former seldom spoke in public. Adams contrasted their services in Congress as follows: "I was active and alert in every branch . . . discussing and arguing on every question, while Franklin was seen from day to day, sitting in silence, a greater part of the time fast asleep in his chair." Jefferson, writing of the same Congress, said: "I never heard Franklin speak ten minutes at a time, nor to essay but the main point." Franklin confessed: "I was but a bad speaker; . . . yet I generally carried my points." Franklin stands out in history as the representative American diplomat, while Adams gained little credit from his foreign service.

It is the duty of a foreign minister to reside at the capital of the country to which he is accredited. The secretary of state has in more than one instance had occasion to bring this rule to the attention of foreign diplomats who have been inclined to fix their residence at New York or some other city. The Printed Instruc-

tions remind American ministers of this rule, but do not require them to remain continuously at the seat of government, especially when the heads of government absent themselves. During such interval or vacation, it is sufficient if the minister establishes himself at some convenient place within the country, and the office of the legation is kept open for business. Under such circumstances a minister is understood to be at his post. A century and more ago it was quite the practice in Europe for the diplomatic corps to follow the court when it changed its residence on vacation or otherwise. Mr. Jay, when minister to Madrid, reported to the Continental Congress that his expenses were much increased from his duty of "following the court."[1]

Envoys abroad should not fail to establish and cultivate the most friendly relations with their colleagues in the diplomatic body accredited to the same government, but the policy of the United States prevents them from taking joint action in questions of a political character. The interests of the United States may require its representative, on certain occasions, to take action similar to that of other foreign representatives; but in such case a violation of the rule as to joint action is avoided by addressing to the foreign office what is termed an "identic note," each of the representatives sending a communication signed by himself only, of substantially the same character as that of his colleagues. An exception to the rule against joint action is sometimes made as to ministers accredited to non-Christian countries, such as China, Persia, and others, where foreigners are

[1] 3 Secret Journals of Continental Congress, 128.

not afforded the protection of established and uniform justice.

The converse of this rule is also observed at Washington, where the joint action of foreign representatives is generally declined at the Department of State. The most notable instance of the enforcement of this rule was the attempt of the British and French ministers during our Civil War to make a joint representation respecting it to Secretary Seward, which he firmly declined.[1] An apparent disregard of this rule occurred just before the commencement of the Spanish war in 1898, when the European ambassadors at Washington were received by the President at the White House to make a joint representation in the interest of peace. The reason given for this action was that it afforded the President an opportunity, which he embraced, to make known to the nations represented and to the world the motives influencing the conduct of the United States. It likewise appears that in 1875 Secretary Fish solicited the joint intervention of the European powers with Spain respecting Cuba.

Two centuries ago it was the practice of nations to make use of Latin in diplomatic correspondence, and later French came into general use, but during the present century each nation has adopted its own language in correspondence. Hence, American representatives abroad in their notes to the foreign office always use the English language. In 1778, when Franklin was accredited as minister to France, Congress resolved that

[1] Seward at Washington, 1846–61, by Frederick W. Seward (1891), 581.

"all speeches and communications may, if the foreign ministers choose it, be in the language of their respective countries; and all replies or answers shall be *in the language of the United States*," — an evasion by the rebellious colonists of the use of the word *English*. Some exceptions to the rule as to the language exist, as, for instance, in Russia, where the foreign office, in its communications to the diplomatic body, as well as its representatives abroad, employs the French, its own language being understood by few foreigners. The same practice is followed in some Oriental countries.

In fact, up to a late date in the nineteenth century, many of the governments of Europe, for convenience of ready communication, used the French language in their diplomatic correspondence. This practice was encouraged by French diplomats. Insistence upon the practice in the case of Germany elicited from Bismarck the famous remark that he would find means which would make a dispatch written in the German language intelligible in Paris.

A minister is often placed in an embarrassing position in revolutionary countries like the Latin Americas by sudden and violent changes of government. In such cases he usually reports the situation to his own government and awaits its instructions before formal recognition of the new order; but meanwhile he is often under the necessity of establishing provisional relations with the new authorities. Upon the death of the sovereign or the advent of a new ruler, in the European monarchies, a new letter of credence is sent to the minister; but not so with an American minister, as the presiden-

tial changes do not affect the continuity or order of government.[1]

Mr. Denby, the American minister to China, went to Peking in 1885 and entered on the duties of his post; but owing to the minority of the emperor he was not able to deliver his letter of credence till 1891, when his majesty assumed the government. The letter which he had held since 1885 was then delivered.[2]

In royal countries the death of a ruler or any member of the royal family or other possible heir to the throne, or the birth or marriage of such princes or princesses, is made the subject to all foreign rulers of what are termed *ceremonious letters*. To such letters it is the duty of the President of the United States to respond. On these letters ex-President Harrison has commented as follows: "It seems almost incongruous to notify a republican government like ours of such an event [the birth of a prince royal]. The form in use for an answer to such communications was possibly prepared by Secretary Jefferson. It assures the happy parents of the joy felt by the President and by the people of the United States over the happy event. The language in use was so tropical that when such a congratulatory letter was presented for his signature one of our Presidents felt compelled to use the blue pencil with vigor. Perhaps, if we were to notify 'our great and good friends,' the kings and queens of the earth, of the birth of every 'heir possible' to the presidency, they would break off the correspondence."[3]

[1] 7 Opinions of Attorneys-General, 582.

[2] U. S. For. Rel. 1891, 376.

[3] This Country of Ours, Harrison, 192.

It has not been the practice of the government of the United States to notify the changes of the presidency to other governments. As to this practice Secretary Seward wrote: "We receive from all monarchical states letters announcing the births and deaths of persons connected nearly with the throne, and we respond to them in the spirit of friendship and in terms of courtesy. On the contrary, on our part, no signal incident or melancholy casualties affecting the Chief Magistrate or other functionaries of the Republic are ever officially announced by us to foreign states. While we allow the foreign states the unrestrained indulgence of their peculiar tastes, we carefully practice our own. This is nothing more than the courtesy of private life extended into the intercourse of nations."[1] At the time of the assassination of President Lincoln no official announcement of the tragic event was sent to foreign governments, but no similar event of the century attracted such universal attention from all classes and races. The communications of condolence from the rulers and governing bodies of all nations, as well as from civic organizations and the masses of the people, throughout both hemispheres, were collected and printed in a large folio volume, and form a curious and unique manifestation of sympathy.[2]

There is a rule in some countries which prohibits their diplomatic representatives abroad from marrying foreign wives without the consent of the sovereign.

[1] 1 Wharton's Digest, 632.

[2] This volume was republished as Part IV to U. S. Diplomatic Correspondence, 1865.

The German minister to China some years ago, who had had a long and highly creditable diplomatic career, became enamored with the attractive daughter of the American minister to Korea, and, his telegraphic request for the permission of the emperor being refused, he married the young lady in spite of it. His act was followed by his recall, and he was permanently retired from the service.[1] Other German diplomats have been more fortunate in securing their emperor's consent, and have profited by the companionship and counsel of American consorts.

I refer in the next chapter to the constitutional prohibition which does not allow a minister of the United States to accept an office from a foreign government, but this does not prevent him from acting as the representative of another government at the court to which he is accredited, when the other government for any reason has no representative there. In this capacity he can not only hold relations with the foreign office in behalf of the third government, but can extend his protection to citizens or subjects of that government resident or being in the country. He cannot, however, accept the trust without the approval of his own government and the consent of the government to which he is accredited. For this service he is not allowed to receive any compensation.

[1] 2 China and her People, by Charles Denby (1906), 236. Minister Denby writes of his colleague, Herr von Brandt: "He surrendered the first diplomatic position in the Far East, married his sweetheart and retired to lead a scholarly life at Wiesbaden. Here is a lover's romance, crowned with magnificent renunciation of place and power, found in the musty records of diplomacy."

One of the most noted cases of this character was the service which the American minister to France, Mr. E. B. Washburne, rendered the German government and its subjects in Paris as its representative during the Franco-German war of 1870–71.[1]

The French ambassador to the United States acted as the Spanish representative during the war of 1898, and in that capacity signed with the secretary of state the protocol arranging for the termination of hostilities and the peace negotiations.

[1] As to Mr. Washburne's services, see U. S. Foreign Relations, 1870 and 1871, France. See also 1 Recollections of a Minister to France, by E. B. Washburne, 1887, chaps. 2 and 3.

CHAPTER VII

COURT DRESS, DECORATIONS, AND PRESENTS

Connected with the social duties of envoys of the United States is the matter of diplomatic dress or court costume, which has been a vexed question in our diplomatic history, and has been a subject of official correspondence and Congressional discussion far beyond its intrinsic importance.

In the earlier years of the service our representatives appear to have been left free to wear such court dress as seemed to them most fitting. The plain Quaker costume in which Franklin is represented, and which so attracted the Parisians, and the "spotted Manchester velvet suit" which he is said to have donned on several important occasions are often mentioned in accounts of his service. The Puritan John Adams, when he arrived in Paris to join our Peace Commissioners, is related to have first visited the tailor and wig-maker before he called upon his colleague, Dr. Franklin. And yet Mr. Adams found these exactions of dress very repugnant. In an official communication to Secretary Jay, in giving an account of the preparations for his mission to Great Britain in 1785, he reports that he was informed that he must make London in time for the king's birthday; and to that end he must carry over from Paris "a fine new coat, ready made, for that it was a rule of etiquette

there for everybody who went to court to have new clothes and very rich ones, and that my family must be introduced to the Queen. . . . I hope, sir, you will not think this an immaterial or a trifling matter, when you consider that the simple circumstances of presenting a family at court will make a difference of several hundred pounds sterling in my inevitable expenses."[1] And in reporting in detail his presentation, he adds this comment: "It is thus the essence of things is lost in ceremony in every country of Europe."

The first authorized use of a uniform seems to have been upon the occasion of the peace negotiations following the second war with Great Britain. The "mill-boy of the slashes," Henry Clay, and his four colleagues appeared at the Conference at Ghent in 1814 in a costume which is described as follows: A blue coat, lined with silk, straight standing cape, embroidered with gold, single-breasted, straight or round button-holes slightly embroidered. Buttons with the artillerist's eagle stamped upon them, i. e. an eagle flying, with a wreath in its mouth, grasping lightning in one of its talons. Cuffs embroidered in the manner of the cape; white cassimere breeches, gold knee buckles; white silk stockings; and gold or silver shoe buckles. A three-cornered chapeau de bras, not so large as those used by the French, nor so small as those of the English. A black cockade with an eagle attached. Sword, etc., corresponding.

By a circular issued by the Department of State in 1817 this uniform was adopted for diplomatic ministers. The secretaries of legation were to wear the same cos-

[1] 8 John Adams's Works, 250.

tume, with the exception that their coats were to have less embroidery than those of the ministers.

In 1823 the Department of State, in order to secure uniformity, had prepared an engraved design of the costume to be worn by the ministers of the United States at foreign courts, on occasions when full dress was required. The instructions which accompanied this engraved design say: "In the monarchical governments of Europe, a minister of the United States is compelled to conform to the established usages of appearing in the presence of the sovereign in a court dress. He cannot, indeed, deliver his credential letter without it, and this uniform was adopted for the convenience of using the same dress upon all necessary occasions, and at every court."

At the commencement of the administration of President Jackson a further circular on the subject was issued to the diplomatic body of the United States. It does not appear whether or not this was occasioned by some remissness in the observance of the previous instructions, or the democratic spirit of simplicity of "Old Hickory;" at any rate, the uniform prescribed was much less showy than that fixed by the circular of 1817. The new circular stated that "the President has thought proper to adopt the following as the dress to be used by the diplomatic agents of the United States upon all such occasions [when a court dress is required], being recommended as well by its comparative cheapness as by its adaptation to the simplicity of our institutions, namely: a black coat, with a gold star on each side of the collar near its termination; the under clothes to be black or white, at the option of the wearer; a three-cornered

chapeau de bras, with a white cockade and a gold eagle; and a steel mounted sword with white scabbard." It is understood, however, that the use of this particular dress was not prescribed by the President. It was "barely suggested by his direction, as an appropriate and convenient uniform dress for the use of the diplomatic agents of the United States residing near foreign governments."

No further action appears to have been taken in regard to the costume till the administration of President Pierce, whose secretary of state, Mr. Marcy, prided himself on his attachment to republican simplicity. In 1853 he issued a circular which became famous in our diplomatic annals. The body of the circular is as follows: —

"In performing the ceremonies observed upon the occasion of his reception, the representative of the United States will conform, as far as is consistent with a just sense of his devotion to republican institutions, to the customs of the country wherein he is to reside, and with the rules prescribed for representatives of his rank; but the Department would encourage as far as practicable, without impairing his usefulness to his country, his appearance at court in the simple dress of an American citizen. Should there be cases wherein this cannot be done, owing to the character of the foreign government, without detriment to the public interest, the nearest approach to it compatible with the due performance of his duties is earnestly recommended. The simplicity of our usages, and the tone of feeling among our people, is much more in accordance with the example of our first and most distinguished representative at a royal court than the practice which has since prevailed. It is to be

regretted that there was ever any departure in this respect from the example of Dr. Franklin. History has recorded and commended this example, so congenial to the spirit of our political institutions. The Department is desirous of removing all obstacles to a return to the simple and unostentatious course which was deemed so proper, and was so much approved in the earliest days of the republic. It is our purpose to cultivate the most amicable relations with all countries, and this we believe can be effectually done without requiring our diplomatic agents to depart in this respect from what is suited to the general sentiments of our fellow citizens at home. All instructions in regard to what is called diplomatic uniform, or court dress, being withdrawn, each of our representatives in other countries will be left to regulate this matter according to his own sense of propriety, and with a due respect to the views of his government as herein expressed."

This circular, when it reached the legations in Europe and was made public, created a great flutter of excitement in court circles, and for a long time was a topic of social gossip and newspaper comment, the general current of which was in ridicule of the United States. It was likewise made the subject of an inquiry by Congress, and full details of the manner of its reception in Europe were communicated to that body by the secretary of state.[1] In no court was more serious objection made to it than in London. The tribulation it occa-

[1] For department circulars and correspondence respecting diplomatic uniform, see S. Ex. Doc. 31, 36th Cong., 1st Sess., and S. Ex. Doc. 68, 40th Cong., 2d Sess.

sioned Mr. Buchanan, then our minister at St. James, has become a matter of history. He finally solved the grave question by buckling a black-hilted sword on his plain dress suit. At Paris it appears to have given more domestic trouble to the legation than it caused at the court. When the circular was received, the legation was in charge of the secretary, Mr. Sanford, who seems to have found little difficulty in securing the consent of Louis Napoleon's master of ceremonies for his appearance at court in an ordinary dress suit. But when Mr. Mason, a new minister, arrived, he reported to the department that he was satisfied, on inquiry, that his appearance on state occasions would be more acceptable in uniform, and his action in using one was approved by Secretary Marcy; whereupon Mr. Sanford resigned in high temper.

At Berlin, Vienna, Stockholm, and other capitals, the ministers were given to understand that a court dress would be required, our minister at Stockholm reporting that his "appearance at court in plain clothes would have been likely to be regarded by the Swedish government in the light of a spirit of a republican propagandism." Some of the courts of the smaller countries, however, showed a much more conciliatory spirit. The minister of foreign affairs at Turin "very politely expressed his acquiescence in the good sense and propriety of the instructions, and stated it to be his belief that there would be no difficulty on that score at court." The minister at Lisbon informed the secretary for foreign affairs that he proposed to wear on official occasions an ordinary evening suit, "with a simple American

button indicating my representative capacity;" and the secretary replied that in view of the instructions of his government on the subject, he was satisfied there was no want of respect meant, and that he did not doubt that what he proposed to wear would be perfectly acceptable to his majesty.

Thus the matter rested, each minister being left to carry out the spirit of Secretary Marcy's circular in the manner best suited to satisfy the sentiment of the court and his own tastes, until 1867, when Congress enacted a law prohibiting officials in the diplomatic service of the United States from wearing any uniform or official costume not previously authorized by Congress. Another statute modified the prohibition to the extent of authorizing all officers who had served during the rebellion as volunteers in the army of the United States to bear the official title, and, upon occasions of ceremony, to wear the uniform of their rank when discharged.[1] Under this provision ex-officers of the Union army who have been appointed to the diplomatic service have, where the place and occasion warranted it, appeared in their military uniform at state ceremonies. Some ministers, however, have made themselves ridiculous by securing an appointment in the militia service of the United States and making use of that uniform. A story is told of one of our representatives at a European court who appeared at the palace in the garb of captain of a city cavalry troop, a post he had held at home; which led the monarchical diplomats, attracted by his metal helmet,

[1] Revised Statutes of the United States, 1878, sects. 1688 and 1226.

quizzically to ask if he belonged to a fire company in America.

The Printed Instructions of the Department of State interpret the prohibitory law cited to permit diplomatic officers to wear the dress which local court usage prescribes as requisite upon occasions of ceremony. Under this interpretation, the members of the United States embassy in London, for instance, comply with the requirements of a court dress by appearing on state occasions in knee breeches, with gilt buckles on their shoes, and in other respects in ordinary evening dress. At St. Petersburg the American ambassador is received at the imperial palace entertainments in what Secretary Marcy termed "the simple dress of an American citizen," but at the ceremony of the Czar's coronation no one was admitted without a uniform or court dress, and the members of the United States legation complied with this requirement. A similar practice prevails at some other courts in Europe.

Secretary Bayard, in commenting approvingly upon the law prohibiting the use of uniform for diplomats in an instruction to the minister to Spain, wrote: "I have been told of a pertinent illustration of this in Spain, some years ago, on the occasion of the first official reception of the late King. All the dignitaries and officers of the realm, to the number of some three thousand, were in attendance, and foreign representatives likewise assisted. Uniform being *de rigueur*, every one wore that of the highest official or titular rank to which he was entitled. In the whole assemblage four men appeared in evening dress — the president of the Senate,

the president of the Chamber of Deputies, and the minister and secretary of legation of the United States. They were indeed conspicuous, but necessarily so. The Spanish legislative body wears as such no uniform. Either of the presiding officers might have worn, as a private individual, any one of the uniforms belonging to the rank held in other official stations, as ambassador, privy councillor, or grand cross; but such uniform would have been beneath the dignity of the representative function with which they stood invested.

"Upon reflection, and in the light of this example, it may be questioned whether the representative quality of an envoy, the highest known in the coequal intercourse of nations, is not rather diminished than enhanced by wearing, as is done in some cases under statutory authority, the uniform of past or present military rank." [1]

Secretary Marcy, it has been seen, cited the dress of Dr. Franklin as commended by our history and proper for imitation as a court costume. It is well known what was his ordinary dress. It is described by a French writer of the period of his residence as American minister in Paris as follows: "The minister was usually dressed in a coat of chestnut-colored cloth, without any embroidery. He wore his hair without dressing it, used large spectacles, and carried in his hand a white staff of crab-apple stock." The accuracy of this description is confirmed by other contemporaneous authorities.

But what was worn by him at court is not so definitely known. A seemingly authentic statement is that, on the ceremony of signing the treaty of alliance with France

[1] 1 Wharton's Digest, 747.

of 1778, he donned "the suit of spotted Manchester velvet" which he wore at the privy council in London, when he was excoriated by the attorney-general, but it is not certain that he ever wore it again. Weems, in his biography of Franklin, recites this incident: —

"When Dr. Franklin was received at the French court as American minister, he felt some scruples of conscience in complying with their *fashion as to dress.* He hoped, he said to the minister [of foreign affairs], that, as he was a plain man and represented a plain republican people, the King would indulge his desire to appear at court in his usual dress. Independent of this, the season of the year, he said, rendered the change from warm stockings to fine silk ones somewhat dangerous.

"The French minister made him a bow but said that *the fashion* was too sacred a thing for him to meddle with, but he would do himself the honor to mention it to His Majesty. The King smiled and returned word that Dr. Franklin was welcome to appear at court *in any dress he pleased.*"[1]

This statement might be accepted as conclusive as to the character of the court costume of our great diplomat, but for the fact that since his story of George Washington and his hatchet has been discredited, this biographer is not regarded as high authority on anecdotes. Dr. Edward Everett Hale, who has written the most exhaustive work on Franklin's residence in Paris, is not inclined to accept Secretary Marcy's view of his court dress. In confirmation of his opinion that the Doctor observed the usual custom of the court as to dress, he cites the

[1] Weems's Life of Franklin, 212.

fact that on the marriage of a young lady friend of his to his nephew, he caused to be painted, as his wedding present to the bride, a life-size portrait of himself, still extant, in which he appears in a full dress of blue silk, fully embroidered with gold, and wearing a wig.

In his audience of the king, after signing the treaties of 1778, Parton describes Franklin as dressed "in a suit of plain black velvet, with the usual snowy ruffles at wrist and bosom, white silk stockings and silver buckles," but without the usual chapeau and sword. He went without a wig, it is said, because the one made by the perruquier did not fit his large head.[1]

Mr. Dallas, who succeeded Mr. Buchanan at London, had much trouble in meeting the requirements of the court in respect of dress. At one of the levees at St. James, he was accompanied by a countryman, an officer of the West Point Military Academy, who was in uniform; but because he did not wear a sword, he was refused presentation; whereupon the minister and suite withdrew from the palace without appearing in the royal presence.[2]

Many American representatives abroad have strongly advocated the adoption by the government of a diplomatic uniform, but the spirit of Secretary Marcy's circular has the approval of the country, as evidenced by the legislation of Congress. One of the most experienced of our diplomatists, at the close of a long public life, left on record this testimony: "Truth compels me to add that, having myself never worn anything save

[1] 2 Parton's Life of Franklin, 311.

[2] 1 Dallas's Letters from London, 71; 2 ib. 38.

plain evening dress at any court to which I have been accredited, or at any function which I have attended, I have never been able to discover the slightest disadvantage to my country or myself from that fact."[1]

Akin to the topic just discussed is the practice in royal governments of making presents to and conferring orders and decorations upon foreign diplomatic representatives on special occasions, such as at the conclusion of treaties or at the termination of their missions. The practice, a century and more ago, was carried to extravagant limits, when large sums of money, valuable presents, and distinguished orders were bestowed upon ambassadors and ministers. Lord Castlereagh, English ambassador at the Vienna Congress and at Paris, at the close of the Napoleonic wars, received twenty-four snuff-boxes, each worth one thousand pounds sterling, besides other articles equally costly. Count Romanzoff, the chancellor of Russia, was enabled, from the presents of this kind which he received, to establish a large fund, the income of which he dedicated to soldiers' pensions. The custom grew to such evil proportions that it has been greatly diminished and modified in recent years.

The existing practice was recognized in a modest way by the government of the United States at the beginning of its existence, but was followed for a brief period only. Mr. Jefferson, who had just returned from the mission to France, entered on his duties as secretary of state March 21, 1790. The next month he addressed a letter to the Marquis de la Luzerne, who had terminated his mission as French minister and returned to Paris

[1] 2 Autobiography of A. D. White (1905), 371.

two years before, conveying to him the assurance of the high appreciation of the President for his useful services during his mission, and informing him that as soon as they could be prepared, a gold medal and chain would be sent to him as a token of the high esteem of the people and government of the United States.

On the same date Secretary Jefferson instructed Mr. Short, the American representative in Paris, to have the medal and chain for the marquis prepared and delivered to him. On one side was to be the coat of arms of the United States; and he suggested as a design for the reverse, "a Columbia (a fine female figure) delivering the emblems of peace to a Mercury, with a legend 'Peace and Commerce,' circumscribed with the date of our republic." In a later letter the secretary directed Mr. Short to have made and attached to the gold medal "a chain of three hundred and sixty-five links, each link containing gold to the value of two dollars and a half. The whole will make a present of little more than a thousand dollars. . . . Say nothing to anybody of the value of the present, because that will not always be the same, in all cases."

A similar present was prepared and sent to Mr. van Berckel, the first minister from the Netherlands, although he also had closed his mission two years previously. The next to be favored was Count de Moustier, minister from France, successor of Luzerne. We shall see in a later chapter that this diplomat so conducted himself as to lead our government to ask for his recall, and he had gone home nominally on leave. Nevertheless, upon receiving notice from him that he had been given

another appointment, Secretary Jefferson sent him quite an effusive letter of regret, and caused the gold medal and chain to be delivered to him. The last foreign minister to receive this present was Colonel Ternant, of France, in 1793.

Attached to the copy of the secretary's letter to Ternant, in the archives of the department, is the following: "Notes on the subject of the present. It was proposed that the Medal should always contain 150 dollars worth of Gold; it was presumed the Gentlemen would always keep this.

"The chain was to contain 365 links always, but these to be proportioned in value to the time the person had been here, making each link worth 3 dimes for every year's residence. No expense to be bestowed on the making, because it was expected they would turn the Chain into money." [1]

It does not appear in the official records why this practice was discontinued, but doubtless its inconsistency early became apparent to a government which did not allow its own diplomatic representatives to receive similar presents from foreign governments. When the

[1] 3 Writings of Jefferson, edited by H. A. Washington (1853), 140, 142, 170, 206; MSS. Department of State, France.

The "Notes" above quoted contain also this table:—

Luzerne's chain for 8¼ years' residence at 2½ D. a link with the Medal worth	1062½ D.
Van Berckel's chain for 5 years' residence at 1½ D. a link with the Medal worth	697 D.
De Moustier's chain for 3 years' residence at 9 dimes a link with the Medal worth	478½ D.
Ternant's chain for 1¾ (say 2) years' residence at 6 dimes a link with the Medal worth	369 D.

Federal Constitution was framed, a clause was inserted as follows: —

"No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of Congress, accept of any presents, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."[1]

An examination of the proceedings of the convention shows that this was one of the very few provisions of the Constitution that was adopted without opposition, its eminent appropriateness for a democratic government being recognized by the fathers of the republic. Mr. C. C. Pinckney, who introduced it, said its purpose was to preserve "our foreign ministers and other officers of the United States independent of external influences."[2] Its adoption caused the practice to be discontinued of presenting a gold medal and chain to departing foreign ministers.

The first case which was brought before Congress under this provision was one of peculiar interest. Thomas Pinckney, of South Carolina, who had served with great gallantry throughout the Revolutionary War and was desperately wounded, after having been governor of his State was appointed minister to Great Britain. From that post he was transferred to Madrid and successfully negotiated the treaty with Spain of 1795, which continued in force without change for more than a century.

[1] Article i, sect. 9, clause 8.

[2] 3 Documentary History of the Constitution of the United States, Washington, Department of State (1900), 600.

On his return home he was elected to the Fifth Congress. While a member of that body he addressed a letter to the Speaker of the House, in which he stated that on taking leave of the court in London and on concluding the treaty with Spain, he was informed that the presents usual on such occasions would be prepared for him, and that he had replied that he could not accept them without the consent of Congress, and that in due time he would apply for that consent; and he, therefore, asked for the determination of Congress.

The subject was made the special order of the day for a date five weeks later, when it was taken up and debated at great length. Those who opposed giving the consent of Congress contended that it was unrepublican to receive presents and decorations from kings, that it might tend to corruption, and that it would require reciprocal presents by the United States to foreign ministers in Washington. The friends of the measure ridiculed the suggestion that it would establish a dangerous precedent; and claimed that as General Pinckney had negotiated a useful and popular treaty, and had discharged his duties abroad with credit, he should be permitted to receive the testimonials of respect tendered him by the foreign sovereigns.

The opponents admitted that no stronger case than the present one could arise for the favorable action of Congress, as General Pinckney's services to his country in the war and abroad had been of the most distinguished character, and he was then a highly esteemed member of that body; but they claimed that a precedent should then be established that would serve to prevent all fur-

ther applications in the future. It was stated in the debate that only one similar case had occurred, and that was under the Continental Congress. Although the Articles of Confederation prohibited officers from receiving such presents, permission had been granted John Paul Jones, upon the special application to Congress of the French minister, to accept a decoration from the King of France as a testimonial of his majesty's admiration for his great bravery. But it was said that the fact that the gallant commodore was dubbed a chevalier and permitted to wear a ribbon had only subjected him to the ridicule of his countrymen.

The resolution granting the permission was rejected, but a few days later, at the request of the chairman of the committee on foreign affairs, who had advocated the measure, a further resolution was unanimously adopted that the House was "induced to such refusal solely by motives of general policy, and not by any view personal" to General Pinckney. The chairman said that "the purity of this gentleman's character, and the importance of his services furnished a happy opportunity of establishing an invariable rule precluding the acceptance of presents, which no merit hereafter should induce the House to depart from." [1] It is curious to note that General Pinckney was the brother of C. C. Pinckney, the author of the clause of the Constitution prohibiting presents.

It is not stated what was the present tendered by the Spanish government, but it seems to have been a gold snuffbox. The value of the present from the British gov-

[1] Annals of Congress, 5th Cong., vol. 2, 1570, 1583, 1775.

ernment may be seen from the following extract from the Diary of John Quincy Adams, written on taking leave of the court at the conclusion of his mission in 1817: —

"Chester [the master of ceremonies] inquired of me in what manner I should choose to receive the usual present given to foreign ministers on the termination of their missions, which, he said, was for ambassadors of the value of one thousand pounds sterling and for ministers five hundred pounds sterling. I told him that by the Constitution of the United States no person in their service was permitted to accept a present from any foreign sovereign, and I must therefore decline any one that might be offered me here." Mr. Adams added this comment: —

"The prohibition of the Constitution of the United States in this case has my hearty approbation, and I wish it may be inflexibly adhered to hereafter. The usage itself, as practiced by all European governments, is, in my judgment, absurd and indelicate, with at least very strong tendencies to corruption. On the part of the United States there is a peculiar reason for prohibiting their servants from taking such gifts, because, as they never make presents to the ministers of foreign powers who have been accredited to them, there is not even the plea of reciprocity to allege for allowing it. For American ministers to be receiving gifts from foreign powers whose diplomatic agents in America never receive anything in return would exhibit them rather as beggars receiving alms from opulent princes than as the independent representatives of a high-minded and virtuous republic." [1]

[1] 3 J. Q. Adams's Memoirs, 527.

The action of Congress in 1798 on General Pinckney's case stood for many years as a precedent against allowing officers of the United States to receive presents or decorations from foreign governments. But the prohibition of the Constitution did not embrace citizens not in the public service, and the French Legion of Honor was being tendered to and accepted by private citizens until it attracted the attention of Congress. The subject was fully discussed by that body, and an amendment to the Constitution was passed by a two-thirds vote in 1809, declaring that if any citizen should accept any present or emolument of any kind whatever from a foreign king, prince, or power, such person should cease to be a citizen of the United States. On the passage of the proposed amendment, its purpose was announced to be to determine "whether or not we were to have members of the Legion of Honor in this country."

Eleven of the seventeen States ratified it, some of them by a unanimous vote; two States divided as to their senate and house, two rejected the amendment, and two States omitted to vote upon it.[1] The argument of the opposition was that the existing provision of the Constitution was sufficient, and that a sweeping prohibition should not be adopted, as in certain highly meritorious cases the decoration might be worthily bestowed. Although the amendment failed because a vote in its favor of three fourths of the States was not obtained, it was apparent that the sentiment of the country was very strongly against the acceptance of the

[1] Annals of Congress, 11th Congress, part 1, 530, 547, 549, 571, 576, 635, 671; part 2, 2006, 2050; 2 Doc. Hist. of Constitution, 452, etc.

Legion of Honor or any other foreign decoration even by a private citizen of the United States. Justice Story, in commenting upon the amendment, says the provision of the Constitution "is highly important, . . . it is founded in a just jealousy of foreign influence of every sort," and that the prohibition ought to be extended to private citizens the same as to officers of the government.

No further action seems to have been taken by Congress on the subject until 1835, when the Emperor of Morocco sent to the President through the consul at Tangier, two blooded horses and a lion. Congress passed a joint resolution directing that the horses be sold and the money given to the orphan asylums of the District of Columbia, and the President was authorized to present the lion to some suitable institution or individual. This led to the issuance of a circular, by order of President Jackson, to our ministers and consuls, directing them to make known to foreign governments that presents of all kinds to our officers were prohibited by the Constitution, and that they should not receive them when tendered. But this did not prevent the Imaum of Muscat from dispatching a vessel carrying a variety of presents to the President. The arrival of the vessel in New York in 1840 attracted general attention, and occasioned a long debate in Congress. John Quincy Adams occupied the floor during two days, with a speech of several hours in length, in which he contended that the presents should not be received, and gave an interesting review of the monarchical practice of decorations and present giving, which he denounced as demoralizing, and which ought

not to be recognized by a republican government. It was held, however, that we could not refuse them without giving offense to the "barbarian" ruler, who had on previous occasions shown great friendship to American vessels in distress, and Congress finally accepted the presents, and directed that such of them as were not suitable to be placed in the Department of State should be sold and the proceeds deposited in the Treasury.[1]

The attitude of Congress being so strongly against the practice of receiving presents, the offer of them by foreign governments had fallen largely into disuse, but has been revived in recent years. The Printed Instructions of the Department of State on the subject are very explicit, as is seen from the following extract. After citing the constitutional provision, they say:—

"It not infrequently happens that diplomatic officers are tendered presents, orders, or other testimonials in acknowledgment of services rendered to foreign states or their subjects. It is thought more consonant with the character of the diplomatic representation of the United States abroad that every offer of such presents should be respectfully but decisively declined. . . . Should there be reason to anticipate such an offer, informal notice, given in the proper quarter, of the prohibition against accepting a direct tender thereof would avoid the apparent ungraciousness of declining a courtesy."[2]

The more troublesome practice to control is that of

[1] Congressional Globe, 26th Cong., 1st Sess., July 7–10, 1840, vol. 8, 512–519; 4 Statutes at Large, 792; 5 ib. 409, 730.

[2] Instructions to the Diplomatic Officers of the United States, 1897, 27.

the tender of decorations and orders. Notwithstanding our professions of democratic principles, there seems to be a widespread desire in the country to secure from foreign governments an order and the right to wear a ribbon, a gilt emblem, or other bauble; and Congress of late has been frequently applied to for the removal of the constitutional disability in this respect in favor of a minister, or officer of the navy, army, or other department of the service, on whom some foreign government wishes or has been induced to confer a decoration. I have cited the opinion of John Quincy Adams, the man of widest diplomatic experience in the history of our country, as to the inconsistency and evil influence of presents and decorations on our ministers abroad. Our naval officers are those who in recent days have been most exposed to the temptation. They visit foreign ports in our men-of-war, burn powder in salutes, exchange courtesies, and open champagne. Such martial feats would hardly seem to call for any special action of either government. But there has appeared in the newspapers the following announcement: —

"Minister Loomis has informed the Department of State that the Venezuelan government desires to confer upon Admiral —— and the commanding officers of the North Atlantic Squadron, who recently visited La Guaira, the decoration of the Order of the Bust of Bolivar."

To meet the desires of the Venezuelan government a special act of Congress would be required, but the "unspeakable" Turk seems to more perfectly grasp the situation. The recent visit of one of our naval vessels

to the Bosporus was followed by the following press telegram: —

"The Sultan of Turkey has just decorated a young New York lawyer, —— ——, son of Capt. ——, of the Navy, as a mark of his esteem for Capt. ——, who could not accept a foreign decoration without the consent of Congress, for which he did not wish to ask."

This same monarch, who was denounced by Gladstone as "the great assassin," and whose disregard of American rights has already been noticed, has similar methods of conciliating American ministers. Those officials cannot receive his medals and ribbons, but some of them have allowed Abdul Hamid to decorate their wives with some of his various orders, or to bestow rich jewels upon their daughters — an evasion of the constitutional prohibition of scant credit to American representatives.

Similar to the heroic exploits of naval officers, such as just narrated, which have commanded the gratitude of foreign rulers, are the services rendered by military officers on junketing tours to witness military manœuvres abroad, and by other government officials detailed to receive the guests of the nation, as in the case of the French representatives at the dedication of the Rochambeau statue, and the visits of Prince Henry of Germany and the crown prince of Siam, which have evoked the tender of ribbons of the Legion of Honor, gold cigarette cases, diamond pins, photographs, and various other evidences of sovereign appreciation.

On the return of Prince Henry from his visit to the United States a few years ago, press telegrams from Berlin announced that the German cabinet had prepared

a list of about three hundred American officials and citizens, who were to receive recognition for their attentions to the prince during his visit. This recognition consisted in the bestowal of imperial orders or decorations, cigarette cases, diamond pins, silver inkstands, photographs of the prince, etc. Quite a number of Federal officials were in the list, and application was made to Congress to suspend the constitutional prohibition, but Congress has thus far failed to pass the necessary bills for that purpose.

A writer, who took the trouble to make the compilation twenty-five years ago, stated that there were then in existence no less than one hundred and forty-three national orders, and it is estimated that the number now exceeds two hundred. It is said that there are 500,000 persons entitled to wear the Legion of Honor. It has been satirically stated by diplomatic writers that sovereigns have found it much cheaper to confer on foreign officials an order and a decoration than even a service of porcelain or a piece of Gobelins tapestry, and that for this reason they are now more freely tendered. We have been accustomed in this country to regard the insignia of the Legion of Honor as a testimonial of distinguished merit on the part of its wearer, but the democratic citizens of America who seem so eager to obtain it will be surprised to learn the estimate in which it is held by some intelligent Frenchmen. A well-known Parisian writer, M. Gobier, the editor of "L'Aurore," in an article contributed a few years ago to the New York "Independent,"[1] has this to say of it:—

[1] The Independent, New York, April 26, 1900.

"The ribbon which is the most sought after is red in color. It is called the Cross of the Legion of Honor, it is sold in the ministries at varying prices, or is given gratuitously to the sleeping partners of politicans, to the purveyors of public departments, to the brothers or husbands of the mistresses of official personages. Two generals of our glorious army — one a count and a senator, the other assistant chief of the grand staff — have been condemned to ignominious penalties for having too openly trafficked in the Legion of Honor; one President of the republic was even expelled because his son-in-law gave crosses as premiums to the subscribers of his newspaper. But these accidents have not paralyzed so fruitful a commerce. There is not a fine bankruptcy or a fine trial for swindling where all the accused are not ornamented with the red ribbon; and when you are in Paris and you find yourself in a public conveyance, at the theatre, or at a table d'hôte, by the side of a gentleman who wears this precious ribbon, you are most urgently recommended to keep watch on your pocket-book."

As I have intimated, the rule which was established by the Fifth Congress in the case of General Pinckney, by the statesmen who framed the Constitution and set our government in motion, and which was for so many years strictly followed, has in recent times been somewhat relaxed. In the debate over the Pinckney resolution it was recognized that some cases of extraordinary merit might arise which would justify an exception to the constitutional prohibition. But it does not seem appropriate in the case of diplomats or others still in the pub-

lic service, or much less of officers of the army, navy, or other departments who gratify foreign rulers and princes by the mere discharge of ordinary service. Congress should be permitted to occupy itself in more important business than in suspending a wise constitutional provision in order to enable one of its republican officials to display a royal gewgaw.

We have seen that the present which the Spanish government tendered to General Pinckney in 1795, and which Congress withheld from him, was a gold snuffbox; also that the British plenipotentiary attending the conferences at the close of the Napoleonic wars received as presents twenty-four snuffboxes of the value of one thousand pounds each. These richly jeweled boxes were the diplomatic fashion a century and more ago, but the fashion has changed. As a reminder of the olden time, Sir Charles Russell, afterward Lord Chief Justice of England, the British senior counsel in the Bering Sea arbitration at Paris in 1893, a great collector of historic snuffboxes, carried a precious one and was constantly offering its contents to his colleagues.

But, as Prince Henry's list of presents shows, snuffboxes have given place in diplomacy to cigarette cases. No longer is the old diplomat's advice, already quoted, applicable, to "take snuff often and slowly." The *prise* from the bejeweled box is now displaced by the cigarette, and the diplomatist collects his thoughts and prepares his replies amid the slowly curling smoke of Turkish tobacco.

An unimportant exception is made to the rule of the government not to give presents to foreigners, in the

permission granted to our embassies and legations in some of the capitals of Europe to give gratuities to certain sub-officials, messengers, or servants attached to the royal palace or foreign office for attentions or services rendered; and a special allowance is made therefor by the department. These are generally given on presentation of the envoy and at Christmas or Easter. It is related of the wife of a newly arrived American minister at one of the courts that she was greatly touched by the delicate attention of the receipt of a beautiful bouquet fresh from the royal gardens; but much of the aroma was taken away when she was informed that it was merely the reminder of the royal gardener that he was not to be forgotten when the legation gratuities were distributed.

The inconvenience which sometimes results from the distribution of these gratuities is illustrated by an incident of my residence in Russia. An audience of the emperor had been arranged for me to deliver an autograph letter from the President tendering his condolence on the assassination of Alexander II. For the same day an audience had been fixed for a minister of one of the smaller European countries to present his letter of recall. The audiences were to take place at Gatchina, one of the imperial country palaces, and my colleague asked to accompany me, and that my *chasseur* or official servant might also act for him.

We were taken in great state in an imperial railway carriage, met at the station by a cavalry escort and carriages, assigned rooms in the palace for rest and preparation for the audiences, and when these were termi-

nated we were entertained at a state luncheon. While I was resting in my room and awaiting the hour of our departure, I heard a violent altercation in the hall outside and sent my *chasseur* to inquire the cause. He reported that my colleague, the —— minister, was quarreling with the butler and other servants as to their fees, he charging them with extortion. I knew from past experience that every one, from the commander of the cavalry escort to the last servant that opened a door for me, would not refuse a douceur, and I had charged my experienced servant to arrange matters to the best advantage. My more economical companion, in discharging that necessary duty himself, had fallen into trouble.

Diplomats are not the only personages who have to pay for their royal entertainments. The monarchs who are entertained by their "cousins," the rulers of other countries, in the royal palaces, find it an expensive hospitality. For instance, it has been authoritatively stated that the late King of Holland, a short time before his death, spent forty-eight hours at Buckingham Palace. The presents which he felt obliged to distribute among the members of Queen Victoria's household amounted to eighteen thousand dollars, gifts which were regarded by the recipients not as favors, but as perquisites.

Mr. James Russell Lowell related to me an incident of his residence as minister at Madrid, to illustrate the matter of diplomatic dress and gratuities. On the occasion of a royal fête day Mr. Lowell repaired to the palace, attired in plain evening dress, as was the custom of American ministers at such ceremonies. The carriage of the minister from one of the republics of Central

America preceded his. Owing to the poverty of its treasury this republic had accepted the services as its representative of a retired resident Spanish merchant, who performed gratuitously the light duties of his post because of its social privileges. On such occasions, the royal stairway, famous throughout Europe for its architectural beauty, the pride of the Spaniards, was lined on each side at every step with the royal guard in gala uniform, and at each of several landings there was stationed a giant halberdier holding a huge mediæval battle-axe.

As Mr. Lowell ascended the stairway, the Central American minister, gorgeously appareled in a brilliantly gold-embroidered uniform with jeweled sword, was saluted at each landing by the magnificent halberdier with a heavy whack of the battle-axe on the marble pavement, which resounded through the arches. As Mr. Lowell passed the landings he received no attention, as he bore no insignia indicating his office. Although a very modest gentleman, he was, as the world knows, an intense American, and as he passed from one landing to another and heard the echoes of the salutes to his colleague preceding him, his patriotic blood began to boil, and at the last landing he addressed the halberdier in good Spanish, "Do you know who I am?" Of course the soldier had to respond, "I do not." "Well," said Mr. Lowell, "I am the minister plenipotentiary of the United States of America, the greatest nation on the earth, and if you don't whack the next time I pass you, I will forget you at Christmas!"

CHAPTER VIII

IMMUNITIES OF DIPLOMATS

THERE are certain immunities or privileges extended to diplomatic representatives under international law and practice which grow out of and are a necessary part of their representative character. These immunities were much greater two and three centuries ago than they are to-day. Formerly, not only were their houses and carriages exempt from all local jurisdiction, but in many capitals an extensive quarter of the city in which their residences were located was under their control and free from even police supervision, and thus became an asylum from local justice and a refuge for criminals. They enjoyed not only all personal exemption from legal process for themselves and all residing within their quarter, but they exercised the right of judgment and consequently of life and death over the members of their suite; they claimed to be in no way responsible for their debts, and they carried their freedom from jurisdiction and taxation to most extravagant lengths. But like the forms and ceremonies which formerly attended the ambassadorial service, these privileges have been greatly diminished, and are now exercised within reasonable limits.

In general terms, it may be stated that diplomatic agents or representatives are subject only to the law of

the state which sends them, and are free from the jurisdiction of the country to which they are accredited; and this immunity extends to all the members of the mission, the envoy's family and domestic servants. But this rule is subject to various exceptions. An envoy is free from arrest and punishment for criminal offense, but his conduct may be of such a flagrant character as to justify the offended government in disregarding this general principle on the ground of considerations of public safety. The usual course of governments, however, in cases of grave crimes or misconduct, is to ask for the recall of the envoy or to dismiss him summarily. The cases are cited of the Swedish minister in London in 1717, and of the Spanish ambassador in Paris the next year, detected in conspiracies against the governments, who were arrested and held as prisoners and finally expelled from the respective countries.[1] It has of late years transpired that the British and Spanish ministers in Washington were privy to the conspiracy of Aaron Burr, in 1804–05, and gave encouragement to his projects.[2] Had the facts been known at the time, undoubtedly they would have been dismissed from the country.

The immunity of the envoy does not extend in so strict a degree to his servants. The coachman of Mr. Gallatin, American minister in London, was arrested in 1827 in the stable of the legation on the charge of an assault. The courts held that he was amenable for the offense, but the secretary for foreign affairs wrote Mr. Gallatin that, while the legation premises were not

[1] The Principles of International Law, by T. J. Lawrence, 1895, 275.

[2] 3 H. Adams, History of the United States, chaps. 10, 11.

exempt from entrance for service on a servant charged with a misdemeanor, courtesy required that they should not be entered without permission being first solicited in cases where no urgent necessity pressed for the immediate capture of an offender.[1]

A member of a legation cannot be required to appear in court as a witness or for any other purpose. The Dutch minister at Washington in 1856 was witness to a homicide in a hotel. His attendance in the court at the trial as a witness was deemed essential, and the government attorney applied to the secretary of state to secure his presence. The minister refused to attend, and request on the Netherlands government was made, through the American minister at The Hague, for instructions to its minister to appear and testify, at the same time bringing to its notice the provision of the Constitution of the United States giving the right to the accused to be confronted with the witnesses against him. The Netherlands government consented that the minister might appear at the Department of State and make his declaration under oath, to which the minister added the condition that he should not be subjected to cross-examination. Such a declaration the government attorney said would not be admitted as evidence, and it was not made. The conduct of the Dutch minister in manifesting such a disinclination to meet the requirements of justice was so displeasing to the government of the United States that he ceased to be *persona grata*, and he was soon recalled.[2]

[1] 1 Wharton's Digest, 650.

[2] S. Ex. Doc. 21, 34th Cong., 3d Sess.

The Printed Instructions remind the diplomatic representative of the United States that the immunity from criminal and civil process cannot be waived except by the consent of his government, as it belongs to his office, not to himself. Neither should he consent to appear before a tribunal except by the consent of his government. Even if called upon to give testimony under conditions which do not concern the business of his mission, and which are of a nature to counsel him to respond to the interests of justice, he should not do so without the consent of the President, which in such case would probably be granted.

The statutes of the United States (Sects. 4063 and 4064) provide that any writ or process of any court of the United States or of a State against a diplomatic minister or any domestic servant of such minister shall be void; and severe penalties are prescribed against any person who shall obtain or execute such a writ or process.

A few instances will illustrate the exemption of members of the diplomatic corps from arrest. In 1892 the Swiss chargé complained to the secretary of state that an attaché of the legation was arrested at Bay Ridge, Maryland, suspected of theft; he was taken by the police, against his claim that his diplomatic character exempted him from arrest, to Annapolis (near by), examined by the chief officer of police, and discharged. The chargé asked for the punishment of the officer making the arrest, and a disavowal of the act. The secretary of state transmitted a copy of the chargé's note to the governor of Maryland, and asked for an investigation

and appropriate action. The case was investigated, the policeman declaring that no claim was made by the attaché of his diplomatic character till he reached Annapolis; the policeman was dismissed from office, and the governor tendered an apology for the act, which was accepted by the Swiss government as satisfactory.

One of the secretaries of the British embassy was arrested in 1904 at Lenox, Massachusetts, charged with running an automobile at an unlawful speed, and taken before a local magistrate. The secretary pleaded his diplomatic exemption from arrest, which the judge refused to recognize, and inflicted a fine. The matter was made the subject of diplomatic intervention; upon the governor calling on the magistrate for an explanation of his conduct, the latter stated that he had no knowledge of the United States statute; the fine was remitted; the proper apology was made; and the incident was closed.

During the same year the police of Washington reported that the counselor of the French embassy had been guilty of speeding his automobile in violation of law, and then asserting his diplomatic exemption from arrest. The city government made complaint to the secretary of state, and the latter referred the communication to the French ambassador, who in reply stated to the secretary of state that the counselor did not admit that he had driven his machine at a speed prohibited by law, but he declared that if such was the fact he was sincerely sorry, for it must have been an inadvertence, as he was always desirous of obeying the laws with the most punctilious regard. The ambassador expressed the

hope that this statement would be acceptable, and it was so received by the city government.

It has been held by the attorney-general that a foreign minister is protected not only from violence, but from insult, such as libel. But libeling foreign sovereigns or governments are not indictable offenses. The trial of William Cobbett in 1791 involved these questions, and, being complicated with domestic politics, attracted widespread attention.[1]

The tearing down of the flag of the Spanish minister in a riot in Philadelphia in 1802 was held cognizable by the state court.[2] In 1892 the French minister complained that a policeman at Jeanette, Pennsylvania, had torn down, rent in pieces, and thrown into the mud a French flag, displayed by a French citizen from his house on Decoration Day. The policeman said that no flag but the "Stars and Stripes" should wave on that day. The secretary of state referred the case to the governor of the state, by him it was brought to the attention of the district attorney, and by the latter to the town authorities, who removed the policeman. The French government expressed its appreciation of the satisfaction accorded in the case. The secretary of state in his letter to the governor said: "Although the flag is only a national emblem when displayed by a competent authority, it is also private property and should under no circumstances be wantonly injured or mutilated by a policeman or by any other person in time of peace.

[1] 1 Wharton's Digest, 266; 3 Life of Pickering, 396 ff.

[2] 1 Wharton's Digest, 650; as to attack on Russian chargé's house, see 1 Wharton, 654.

Neither can a flag be regarded as a mere piece of bunting."

The statutes of the United States cannot be put into execution by the minister of a foreign power merely addressing a note to the secretary of state, complaining of an event which constitutes an infraction; judicial proceedings can be instituted only upon complaint sustained by the oath of a credible witness.

As a diplomatic agent and his suite are free from legal process, so also his residence and office are free from local jurisdiction, those premises being held to possess certain ex-territorial qualities. They cannot be entered, or searched, under process of local law or by the local authorities; yet there are limitations of or exceptions to this rule. When a criminal takes refuge in a legation, he should be surrendered on demand of the authorities, and, if this be refused, an officer of the law would be justified in entering the premises to make the arrest.

Owing to the ex-territorial character of a legation, the child of a minister, or member of his suite, being an American citizen, would be held to have been born within the United States.

The right of asylum which at one time was generally recognized in Europe has long since been abandoned there, and it is now held that the immunity of the mission premises from local jurisdiction extends only to the minister, his suite and household. And yet to a limited extent the practice of asylum for political offenders still exists in certain Spanish-American countries. The Department of State calls the attention of American diplomatic agents to the fact that in some countries, where

frequent insurrections occur and consequent instability of government exists, the practice of ex-territorial asylum has become so firmly established that it is often invoked by unsuccessful insurgents and is practically recognized by the local government to the extent of respecting the premises of a consulate even in which such fugitives may take refuge. The government of the United States does not sanction the usage, and enjoins upon its representatives in such countries the avoidance of all pretexts for its existence. While indisposed to direct its representatives to deny temporary shelter to any person whose life may be threatened by mob violence, it has deemed it proper to instruct them that it will not countenance them in any attempt knowingly to harbor offenders against the laws from the pursuit of the legitimate agents of justice.[1]

The correspondence of the Department of State furnishes many instances of the use of the legations, and sometimes of consulates, in the Spanish-American republics as places of asylum by members of one or the other party in times of revolution and insurrection. One of the most noted cases in recent years was that of the American legation during the civil war in Chili of 1891. During its progress the legation sheltered some of the Congressional party, and when that finally triumphed, the legations of all governments represented at the capital were resorted to by the Balmaceda partisans; President Balmaceda himself taking refuge in the Argentine lega-

[1] For citation of cases and rulings of Department of State, see Right of Asylum in the Legations of the U. S., by Barrey Gilbert, in Harvard Law Review, June, 1901, 118.

ton, where he committed suicide. The legation of the United States was crowded with prominent Balmacedists, who fled there while the city was in the hands of a mob engaged in sacking the houses of the leading members of the defeated party. When the new government was organized, a demand was made on the American minister for the surrender of his guests. This being refused, a guard was thrown about the legation and American citizens and other visitors to it were arrested. Upon an earnest protest from the secretary of state at Washington the troops were withdrawn, but the legation remained under police surveillance.

Following the example of other legations, which had applied for and received safe-conducts for their inmates to leave the country, the American minister, Mr. Egan, applied to the Chilean minister of foreign affairs for permission to the refugees in his legation to do the same. This application was refused, but a number of them, upon private assurance of safety, quietly left the legation. Several, however, remained, and after demand being made by the Chilean government for their surrender for trial on the charge of conspiracy and refusal by the American minister, it was finally verbally agreed, at the expiration of nearly six months from the time asylum was taken in the legation, that the five remaining refugees should not be molested if they left the legation, went to the seaport of Valparaiso, and took passage on a foreign ship. They were accompanied to Valparaiso by the American minister and the Spanish minister with two refugees from his legation, and placed on board an American man-of-war in the harbor, whence they took

passage abroad in a British passenger steamer. In this case the question of asylum was complicated with an attack upon the crew of the United States naval vessel Baltimore in the streets of Valparaiso, which engendered bad blood between the two countries.[1]

The case of General Barrundia, who was arrested on an American merchant vessel in a port of Guatemala, presents the question of the extent of protection afforded by a national flag in a foreign port, and, being akin to the subject of asylum, calls for notice in this connection. Barrundia, a citizen of Guatemala and former minister of war of an administration overthrown by force, went to Mexico, organized an armed expedition, and entered Guatemalan territory for the purpose of exciting an insurrection against the existing government, but was defeated and escaped to Mexico. He then took passage at a Mexican port on an American merchant vessel, which he knew would in the course of its voyage touch at ports of Guatemala, and purchased a ticket for Panama; but it was understood he expected to disembark at a port of Salvador, which country was at the time at war with Guatemala, the latter government having proclaimed martial law throughout its territory.

On the arrival of the vessel in a Guatemalan port the captain, learning that the government would demand Barrundia's surrender, consulted the American minister as to his right and duty, and was informed in a telegram by the latter that Guatemala "has the right to arrest a person on a neutral ship in its own waters in time of war for any cause deemed an offense under interna-

[1] U. S. For. Rel. (1891) Chili.

tional law." On the day the telegram was sent peace was declared between Guatemala and Salvador under an agreement preliminary to a permanent treaty. A Guatemalan officer with a squad of soldiers boarded the vessel in port, and on his attempt to arrest Barrundia the latter resisted with firearms and was killed, whereupon his body and personal effects were taken on shore. The action of the American minister was disapproved by his government, Secretary Blaine writing him a long dispatch in which he took the position that he erred in giving the advice he did to the captain of the vessel; that the war having ended, and the offense charged being political, the passenger was protected in port by the American flag and was not subject to arrest. The minister was at once recalled from his post and a successor appointed in his place; also, the commander of an American naval vessel lying in the port, who had acquiesced in the arrest, was censured by his government. A strong sentiment prevails that the action of the government of the United States was too severe. The better view seems to be that stated by Secretary Bayard a short time before, that "when a merchant vessel of one country visits the port of another for the purposes of trade it owes temporary allegiance and is amenable to the jurisdiction of that country." It is hardly to be expected that a government would refrain from taking from a foreign merchant vessel one of its own citizens who was engaged in fomenting rebellion and who had knowingly and voluntarily come within its territory.[1]

[1] For Barrundia Correspondence, H. R. Ex. Doc. 51, 51st Cong., 2d Sess.

A minister and his suite are not only free from civil process for debt, but the property of the legation and their personal and household effects are free from seizure therefor. It has been decided that the personal effects of an attaché cannot be seized and held by a hotel-keeper.[1]

Mr. Wheaton in his treatise on international law[2] has discussed at length the question how far the personal effects of a diplomatic officer are liable to be seized or detained, in order to enforce the performance, on his part, of the lease of a dwelling-house. In this case the landlord brought in a claim for damage to the premises occupied by Mr. Wheaton while American minister in Berlin. He contested the right of the authorities to detain his personal effects to respond for the claim. They were finally restored to him on payment of a reasonable compensation for the injury done to the premises, but both he and his government denied that the proceeding was well founded in international law. The minister regarded it as important to contest the case for the sake of the principle involved, and he was doubtless technically correct, but his conduct was severely censured by European writers, who pointed out the case of the minister of Hesse Cassel at Paris in the past century, who was refused his passports and not permitted to leave France till his debts were secured.[3]

The government of the United States disapproves of a resort by its representative to diplomatic privileges to

[1] 3 Opinions Attorneys-General, 69.

[2] The Elements of International Law, Henry Wheaton, part 3, chap. 1.

[3] International Vanities, Marshall (1875), 257, 259.

escape indebtedness. While the Printed Instructions set forth the immunity from arrest and process, they add this caution: "It is not to be supposed that any representative of this country would intentionally avail himself of this right to evade just obligations." Secretary Fish, in an instruction to one of our ministers at a European court, wrote: "An envoy is not clothed with diplomatic immunity to enable him to indulge with impunity in personal controversy, or to escape liabilities to which he otherwise might be subjected. The assertion of these immunities should be reserved for more important and delicate occasions, and should never be made use of when the facts of the particular case expose the envoy to the suspicion that private interests or a desire to escape personal or pecuniary liability is the motive which induces it." [1]

The personal effects of a diplomatic officer, the property of the mission, and the real estate occupied by the legation residence and office, if owned by the foreign government, are exempt from taxation; but this exemption does not usually extend to water rents and lighting charges.

A privilege accorded to a legation is that of freedom of religious worship. This was formerly very highly esteemed because of the intolerance which prevailed, and which has not entirely ceased to exist even in Europe. This privilege carries with it a right to maintain a chapel in the legation premises, other foreign residents being permitted to attend services held there. Up to recent years the only place in which Protestant

[1] 1 Wharton's Digest, 643.

worship could be lawfully held in Madrid, Spain, was in the chapel maintained by the British legation.

A diplomatic representative is conceded the privilege of the free importation of effects for his personal or official use, or for the use of his immediate family. The privilege is extended only to the heads of missions. It is a usage founded upon comity rather than an inherent right. In the United States it is not based upon a law of Congress, and is a matter entirely within the discretion of the treasury department. In some countries, as in Spain, the amount in value which a minister may import free is limited to a fixed sum. In the United States it is unlimited, but granted only upon written application or notice by the foreign minister to the secretary of state, who advises the customs authorities through the secretary of the treasury, and in this way a record is kept of the importations. American diplomatic officers returning to the United States are allowed free entry of their personal effects, but this also is founded upon courtesy, and is not specifically authorized by law.

As there exists no positive law for the exemption at the custom house of the duties on personal effects of foreign officials, a notice to the customs authorities of their expected arrival is required in each case. J. Q. Adams related that during his residence in England the Allied Sovereigns who visited London after the battle of Waterloo were required to submit to an examination of their baggage at Dover, because of the failure of the customs authorities to receive instructions. For a like reason, Mr. Rush, before the time of steam vessels, driven by

stress of weather in 1817 into an unexpected English port, was subjected to a rigid scrutiny of his effects at the custom house. "Everything was ransacked; even the folds of linen opened; nothing was overlooked;" and some articles contraband under the law were temporarily detained.[1]

Foreign ministers enjoy certain privileges in time of war. They are entitled to free communication by correspondence with their own government, even if the place of their residence is in a state of siege or blockade. During the siege of Paris in 1870 the diplomatic corps received notice from the German authorities that dispatch bags for their respective governments would be permitted to pass only on condition that the dispatches were unsealed and subject to their inspection. The diplomatic corps protested, and Mr. Washburn determined not to send dispatches under such conditions. In the correspondence which ensued between the two governments Secretary Fish declared the condition to be humiliating and such as could not be accepted by a diplomatic agent with any self-respect. Count Bismarck recognized the right of diplomats to have free and confidential intercourse with their governments, but stated that some allowance should be made for military exigencies, and that the temporary obstruction arose from causes which he could not control. The suspension of free intercourse was brief.[2]

Diplomatic agents are entitled to pass through a

[1] Rush's Court of London, 14.

[2] For correspondence, U. S. For. Rel. 1870, 127; 1871, 283, 377; Washburn's Recollections, 159, 308.

blockade. A belligerent has no right to stop the passage of a minister from a neutral state to the other belligerent, unless the mission of such representative is hostile to the first belligerent. A minister residing at the capital has the right to communicate with the consuls of his government located in a portion of the country in revolt. During the American Civil War some trouble was occasioned the British minister in communicating with British consuls within the Confederate lines by the military officers of the United States, but all detention or interference with the official dispatch bags was promptly disavowed by the secretary of state.

The immunity of a diplomatic representative may be surrendered by his own act, as when he institutes a suit or voluntarily submits to judicial jurisdiction; when he is a citizen of the state to which he is accredited; or when he engages in trade, and suit is brought in respect of such trading arrangements.

The diplomatic immunities apply to a foreign representative for a reasonable time after he has given up his post, while he is preparing to leave the country. A change in the government by which a foreign minister is accredited suspends the activity of his functions, but does not necessarily terminate them, and during such suspension he is entitled to the immunities of a public minister.[1]

[1] Case of Portuguese minister in Washington, 1 Wharton's Digest, 618; 2 Opinions Attorneys-General, 290.

CHAPTER IX

THE TERMINATION OF MISSIONS

A DIPLOMATIC official terminates his mission by resignation, by his transfer to another post, by his dismissal, or by his recall. A change of parties in the United States by popular election brings about an almost complete change in the diplomatic service. Ambassadors and ministers are expected to tender their resignations on a change of the home government, and the resignations usually reach Washington in time to be in the hands of the new secretary of state when or very soon after he assumes office. If in any case a resignation is not so tendered, when a new appointment is determined upon the delinquent incumbent is informed of the proposed change, and, if his resignation is not then tendered, he is usually summarily recalled.

Likewise changes often occur during the same administration by removal. In the case of an envoy against whom no charges are brought, when a change is determined upon, the incumbent should be notified in advance of the intended change and an opportunity afforded him to tender his resignation. Instances have occurred where grave injustice has been done to faithful representatives by allowing them to learn of their removal through the public press. Such occurrences bring the American diplomatic service into disrepute.

The commission of an American diplomatic officer runs without limit as to time. At the beginning of the government, appointments were made for a given period, usually three years; for instance, Franklin and Jefferson, ministers to France, and John Adams, to England, were appointed for the specified period of three years. Mr. Jefferson was of the opinion that no American minister ought ever to be absent from home at European courts more than five or six years at a time. When secretary of state, he declined to support the application for appointment of Mr. Short, his successor at Paris, an intimate friend and neighbor, because he had already been too long out of the country.[1]

It was the early practice of American officials to return their commissions on the expiration of their term of service. A notable instance was that of Washington, who at the close of the War of Independence returned his commission as general-in-chief to Congress in open session in 1783. The archives of the Department of State show similar instances. But in 1831 President Jackson, when John Branch resigned as secretary of the navy, returned to him his commission, saying, "It is your own private property, and by no means to be considered part of the archives of the government." Since that date the practice of returning commissions has been

[1] September 30, 1790, Secretary Jefferson wrote Mr. Short at Paris, as follows: "I think it possible that it will be established into a maxim of the new government to discontinue its foreign servants after a certain time of absence from their own country, because they lose in time that sufficient degree of intimacy with its circumstances which alone can enable them to know and pursue its interests. Seven years have been talked of. Be assured it is for your happiness and success to return." — 5 Jefferson's Writings, 242.

abandoned, and American diplomatic as well as other officers retain in their own possession their commissions.

There has existed a custom in Europe, rather more infrequent now than a century ago, of the sovereign expressing a desire for the retention of an acceptable or favorite envoy from a foreign nation. Instances have occurred where the monarch has manifested such a wish to the President of the United States, but it has rarely had any other effect than to delay for a short time the new appointment, if brought about by a change of parties in this country.

An envoy, if retired in regular order, is furnished a letter of recall, signed by the President and addressed to the chief of the state, and for the delivery of the letter an audience is granted similar to that at his presentation. John Adams, on the expiration of his term of service as minister to England and his recall by Congress, was greatly embarrassed because of the failure of the receipt of the customary letter of recall, which Congress omitted to send him. He was likewise accredited to Holland, and in order to take leave of that government he resorted to the expedient of addressing a letter to the Prince of Orange and to Their High Mightinesses the States General, inclosing the resolution of Congress which terminated his mission, and, informing them of his intended return to the United States, sent them his message of farewell. The Dutch minister for foreign affairs returned these documents to Mr. Adams, stating that they could not be delivered to their destination, as the heads of the States should be addressed directly by Congress, the same as had been the case when his letter

of credence was delivered; or, as Mr. Adams expressed it, it was the rule of all courts that "sovereign should always speak to sovereign."

Mr. Adams, being in London, was more fortunate in securing an audience of George III; but, having no letter of recall to deliver, he made a brief formal address of farewell. As the king's speech on presentation of his letter of credence has already been quoted, his reply should be here given. Because of the troubles which had arisen over the enforcement of the treaty of peace, the king's reply on this occasion was in marked contrast with the former one. He said: "Mr. Adams, you may, with great truth, assure the United States that whenever they shall fulfill the treaty on their part, I, on my part, will fulfill it in all its particulars. As to yourself, I am sure I wish you a safe and pleasant voyage, and much comfort with your family and friends." After this curt farewell, Mr. Adams proceeded to take leave, as he reports to Secretary Jay, "of the Queen and Princesses, the Cabinet Ministers and corps diplomatique — a species of slavery, more of which, I believe, has fallen to my share than ever happened before to a son of liberty."[1]

An envoy should, if possible, remain at his post till his successor arrives, in which case his farewell audience usually immediately precedes the presentation audience of the new minister. It often happens that the envoy's retirement occurs when the chief of the state is absent from the capital and not readily accessible. In that case the letter of recall is usually delivered by his successor.

[1] 2 U. S. Dip. Cor. (1783-89) 827-832.

An instance, however, is noted where a representative to Austria, after having left his post, sent his letter of recall to the United States consul at Vienna, by whom it was delivered. John Randolph resigned his post as minister at St. Petersburg, and en route home delivered his letter of recall to the Russian ambassador in London.

The recall for cause of a minister is made either at the request of the government to which he is accredited, or by his own government upon his own motion. In the first case, it is because his conduct has made him *persona non grata*. The first and most notable instance of this as applied to American representatives was the recall of Gouverneur Morris from Paris at the instance of the French government. He entered upon his duties in January, 1792, and was a witness of the exciting period which marked the overthrow of the monarchy, the execution of the king, the rapid succession of republican governments, and the bloody reign of terror. No minister could have so conducted himself as to be *persona grata* to all these rapidly succeeding governments, but Mr. Morris was especially unfortunate, and far from circumspect in his conduct. He had warm sympathy for Louis XVI, and allowed his feelings to lead him into a plot for the king's escape; he counseled with the monarchists and did not conceal his disgust at the bloody excesses of the Republicans, by whom he was regarded as hostile. Finally, in 1794, when Washington was forced to ask for the recall of the intemperate French minister Genet, the French Directory requested the recall of Morris, and he was forced to leave France.

The state of politics at the time made it very difficult

for American ministers in France to pursue an entirely impartial course. It is known that Morris's predecessor, Mr. Jefferson, while minister, was in consultation with the men who were plotting the overthrow of the monarchy, and that his successor, James Monroe, was in open sympathy with the Directory, and was recalled by President Washington for his partisan conduct.[1]

Omitting other American ministers whose recall has been demanded, mention should be made of the case of Mr. C. A. Washburn, who served as minister to Paraguay from 1861 to 1868 with acceptability to the government of that republic until the advent of President Lopez, who during one of the periodical disturbances assumed the rôle of dictator. Washburn had given asylum to a number of foreigners and some of the members of the overthrown government, and he was charged by Lopez with having conspired with them. A correspondence ensued, Lopez threatened to imprison Washburn, and finally ordered him to leave the country. Fearing for his safety, the government of the United States sent a naval vessel and took him away. A new minister was sent out, accompanied by a squadron of the navy, proper apologies and explanations were made by Lopez, and friendly relations were resumed.[2]

It is usually sufficient to allege that a minister is *persona non grata* to secure his recall, but this is not always the case. In 1891, during the pendency of the

[1] Diplomatic History of the U. S. 1789–1801, by W. H. Trescot, chap. 3; Gouverneur Morris, by T. Roosevelt (Statesmen Series), chap. 10; 2 Diary and Correspondence of G. Morris (1888), chap. 29.

[2] U. S. Dip. Cor. 1868, Paraguay; American Annual Cyclopædia, 1868, Paraguay; History of Paraguay, by C. A. Washburn, vol. 2.

asylum cases and the attack upon the crew of the United States naval vessel Baltimore, mentioned in the last chapter, the Chilean minister in Washington, in a note to the secretary of state, informed him that he had received instructions from his government "to state to you that, in its desire to cultivate cordial and friendly relations with the United States, the continuance of Mr. Egan as minister of the United States in Santiago is not agreeable to it," and asked that another minister be sent.

On the next day Secretary Blaine dispatched Mr. Egan a long cablegram, instructing him to bring to the attention of the Chilean government the President's view of the critical relations of the two countries, threatening a suspension of all diplomatic relations; and, informing the minister that it was stated he was not *persona grata* and his recall had been requested, he was directed to say to the Chilean government that after it had satisfied that of the United States as to its grave complaints, it would be time to consider this request. Two days later, in a note defending the Chilean government from these complaints, its minister in Washington referred to the request for Mr. Egan's recall, adding that he had understood that the secretary of state had recognized "that the Government of Chile had a right to ask that a change should be made." To this Secretary Blaine replied: "Undoubtedly she has that right, provided she assigns a reason. You are too well skilled in diplomatic usage to be reminded that when the nation is pleased to declare that a minister is *persona non grata,* she is expected to assign a reason therefor." The reason that

would have been alleged grew out of the disturbed state of the international relations. Happily they were adjusted in a friendly manner, and nothing more was heard of a desire for the recall of the American minister.[1]

A recent case of recall was that of the American minister to Cuba. The Cuban government complained to the secretary of state of his action in informing a newspaper correspondent of the substance of a note sent by him to that government, but did not make a specific request for recall. The President, however, deemed it prudent to make a change, and he was replaced by another representative, and transferred to another post.

The recall for cause of its own ministers by the government of the United States has frequently occurred. The first and one of the most prominent cases was that of James Monroe, minister to France, which has already been mentioned elsewhere by me;[2] as also that of John Lothrop Motley, twice recalled by his government.[3]

The latest instance is that of the American ambassador to Austria, whose fault, it is announced, was that of allowing his wife, a devout member of the Roman Catholic Church, to take an active part in an effort to secure from the Pope the appointment of an American as a cardinal. The ambassador was absent from his post on leave at the time of his recall, and the secretary of state took the unusual and summary method of notifying

[1] U. S. For Rel. 1891, 345, 308, 350, 352.

[2] Foster's American Diplomacy, 173; Trescot's Diplomatic History, 149.

[3] Foster's American Diplomacy, 431; 4 Memoirs and Letters of Charles Sumner, Pierce; Mr. Fish and the Alabama Claims, by J. C. B. Davis, 1893.

the Austrian foreign office by cable "that the President has been pleased to terminate at once, and without any such delay as would be incidental to the transmission of a letter of recall by mail, the authority of his ambassador to represent him;" and the secretary of the embassy was named as chargé. The ambassador returned immediately to his post, but was not permitted to resume its duties. Meanwhile a new ambassador had been appointed, who, it was announced, would deliver to the emperor his predecessor's letter of recall.

It is an accepted rule of diplomatic usage that every government has the right to determine for itself the acceptability of an envoy accredited to it, and that if his government does not recall him upon request, the government to which he is unacceptable may dismiss him. Ordinarily a request for the recall of a minister will at once be granted. The United States has had frequent occasion to exercise this right. An examination of the leading cases will prove a practical illustration of the causes which justify such action. The first of these cases to occur in the history of the United States was that of M. Moustier, who succeeded M. de la Luzerne as minister from France in February, 1788. He soon developed disagreeable qualities, and made himself unpopular with all classes of society. John Armstrong, afterwards minister to France, wrote to General Gates: "We have a French minister here with us, and if France had wished to destroy the little remembrance that is left of her and her exertions in our behalf, she would have sent just such a minister.[1] He early quarreled with Mr. Jay, sec-

[1] 1 Diary and Letters of Gouverneur Morris, 20.

retary for foreign affairs, and sought to conduct his official correspondence direct with President Washington, but this the latter declined.[1] He raised an issue as to official calls, insisting that the senators should make the first visit, but in this also he was overruled.[2] His conduct became so offensive that within ten months after his arrival Secretary Jay wrote a confidential letter to the minister in Paris, Mr. Jefferson, and intrusted it to Gouverneur Morris, then about to visit Paris, instructing him to make known to the French government the offensive character of Moustier's conduct, both political and moral, and, in the most delicate way possible, without wounding the susceptibilities of that government, to secure his recall. Jefferson felt that the case was of such a delicate nature that he could not approach the minister of foreign affairs officially, and he called to his aid Marquis Lafayette, and made known through him to the minister Moustier's conduct and the urgent desire of our government for his recall. The minister saw at once the necessity of action, but hesitated to make a public recall. He solved the difficulty by taking advantage of a loose expression in one of Moustier's letters which might be construed into a request for a leave of absence. Mr. Jefferson was relieved to be able to write Mr. Jay that the minister would have an immediate leave of absence, which would soon after become a recall in effect. Moustier left America on leave, he never returned, and a chargé *ad interim* filled the

[1] 11 Writings of Washington, 395; 4 Hildreth's History of United States, 395.

[2] 6 J. Q. Adams's Memoirs, 441.

post for nearly two years, until 1791, when a new minister was appointed.[1]

The second instance of request for recall of foreign ministers was the celebrated case of Genet, the envoy of the revolutionary government of France, who arrived in the United States in the presidency of Washington. The next was that of Yrujo, Spanish minister, who was dismissed under aggravating circumstances in 1806. The dismissal of Jackson, British minister, in 1809 arose out of a charge made by him against the secretary of state practically of falsehood and duplicity, but it was also connected with the troubles which gave rise to the war of 1812.[2] The Jackson incident was made the subject of discussion in the animated interview between Secretary Adams and Sir Stratford Canning in 1823, from which quotations have already been made. Mr. Adams in his Diary records: —

"He [Canning] said, hesitatingly, that he did not know that he should have any objection to write me a note on the subject.

"I replied that I had yesterday felt myself the more called upon to insist on this, because he had advanced a pretension in which we never could acquiesce, and because it was not the first time it had been raised by a British minister here.

"He asked, with great apparent emotion, who that minister was. I answered, 'Mr. Jackson.' 'And you got rid of him!' said Mr. Canning, in a tone of violent passion, — 'and you got rid of him! — and you got

[1] 2 U. S. Dip. Cor. (1783–89) 271.

[2] Foster's American Diplomacy, 156, 219, 221.

rid of him!' This repetition of the same words, always in the same tone, was with pauses of a few seconds between each of them, as if for a reply.

"I said, 'Sir, my reference to the pretension of Mr. Jackson was not'— Here Mr. Canning interrupted me, by saying, 'If you think by that reference to Mr. Jackson I am to be intimidated from the performance of my duty, you will find yourself greatly mistaken.'

"'I had not, sir,' said I, 'the most distant intention of intimidating you from the performance of your duty; nor was it with the intention of alluding to any subsequent occurrences of his mission; but' — Mr. Canning interrupted me again by saying, still in a tone of high exasperation: —

"'Let me tell you, sir, that your reference to the case of Mr. Jackson is *exceedingly offensive*.'

"'I do not know,' said I, 'whether I shall be able to finish what I intended to say, under such continual interruptions.'

"He intimated by a bow that he would hear me. 'I was observing,' said I, 'that in referring to the pretensions of Mr. Jackson to take offense at a proposal to continue in writing a discussion commenced by oral conference, I had no intention of alluding to any subsequent transactions of Mr. Jackson or to their consequences.'" [1]

The recall of the French minister Poussin, in 1849, was occasioned by a violent correspondence with Secretary Clayton. The dismissal of Crampton, British minister, in 1855, together with several consuls, was caused

[1] 5 J. Q. Adams's Memoirs, 257.

by the violation of the neutrality laws in enlistments for the British army during the Crimean war. The British government declined to act upon the request for his recall until he should have an opportunity to vindicate his conduct, whereupon his passport was sent him and he was summarily dismissed. The recall of Catacazy, Russian minister, in 1871, resulted from publications in the newspapers inspired by him, attacking the President, and by his disagreeable personal conduct.[1]

The case of Lord Sackville-West, British minister in 1888, was one of special interest because it involved on the part of the minister intervention in the domestic politics of the United States. During the presidential campaign of that year a letter marked private was mailed in California to Lord Sackville, purporting to be from a naturalized citizen of English birth, asking his advice as to the presidential candidate most favorable to British interests whom he and his fellow-countrymen should support. Lord Sackville in his reply, likewise marked private, stated "that any political party which openly favored the mother country would lose popularity," but indicated that President Cleveland's election would be more likely to promote British interests.

The letter to him proved to be a decoy to entrap the minister into an expression of opinion, and his reply was at once published in the newspapers in facsimile reproduction. When confronted by Secretary Bayard with his letter, Lord Sackville acknowledged its genuineness, but stated that it was intended to be private. He, however, submitted to newspaper interviews which

[1] Foster's American Diplomacy, 347, 432.

rather aggravated than improved the statements in his letter. Its publication was within two weeks of the close of an exciting campaign, and it was felt by the partisans of Mr. Cleveland that if anything was to be done to counteract its effects, no time was to be lost. Secretary Bayard cabled Mr. Phelps, American minister in London, expressing "the confident reliance of this Government upon the action of Her Majesty's Government in the premises." It was followed the next day by another cablegram stating that "a strong public sentiment has been aroused, and Lord Salisbury should be permitted as speedily as possible to understand the necessity of immediate action."

Two days later Mr. Phelps telegraphed that Lord Salisbury declined to act until he had received Lord Sackville's explanation, and said his immediate recall would end his political career, which would not necessarily be the case if he were dismissed by the United States. Acting upon this intimation, Secretary Bayard, the day after its receipt, sent Lord Sackville a note stating that it had been brought to the knowledge of his government that it would be incompatible with the best interests of both governments that he should continue any longer to hold his official position in the United States, and inclosed him his passports.

This ended Lord Sackville's public career, as he returned to England and retired to private life, his government not being able to countenance his indiscretion by continuing him in the diplomatic service. The London "Times" gave utterance to the public sentiment of Great Britain in a long editorial, in which it said:

"A more ridiculous spectacle has rarely been witnessed in any civilized country than the flurried and unmannerly haste with which the government of President Cleveland has endeavored to put a slight on this country, obviously for electioneering purposes, before Her Majesty's ministers could deal, one way or the other, with the alleged indiscretion of the British representative at Washington."[1]

The last case to be noted of the recall of foreign ministers at the request of the Washington government is that of Mr. L. A. Thurston, minister of the Republic of Hawaii. The treaty for the annexation of Hawaii negotiated during the Harrison administration had been withdrawn from the Senate by President Cleveland; he had sent out a minister to Hawaii with instructions to bring about, if possible, the restoration of the dethroned queen; and the government of the republic was feeling quite unfriendly to the administration at Washington, in which feeling its minister participated. In order to secure further sympathy and support in the United States, Mr. Thurston gave out to the press certain items of news received by him from Honolulu as to the state of affairs in the islands, which reflected severely upon the administration of President Cleveland. He was called to account for it by Secretary of State Gresham, and he admitted that he had allowed correspondents to copy for publication certain private letters received by him. For this conduct Mr. Thurston's recall was suggested by Secretary Gresham to the Hawaiian government, which acted upon the suggestion and appointed another

[1] For correspondence, H. R. Ex. Doc. 150, 50th Cong., 2d Sess.

minister to succeed Mr. Thurston, who had voluntarily returned to Hawaii.[1]

The practice of some retired American ministers of making a public vindication of their conduct, in cases where they have differed from their government, is to be reprehended. So much abuse has grown out of the practice that the department in its Printed Instructions has forbidden retiring diplomatic officers from retaining any drafts or copies of official correspondence. A minister should trust to time and the official publication of the correspondence for his vindication. It has been well said that a diplomatist, who necessarily assumes confidential relations to his government, is not at liberty to dissolve that confidential connection for his own vindication. The interests of the country have suffered more from the exposure than the character of the minister could possibly have done from his silence. Distinguished instances of this indiscretion in our history have been the vindication by Mr. Monroe of his conduct in France, and the controversy of Lewis Cass on his return from Paris with Secretary Webster. Other indiscretions of this character on the part of returned ministers might be cited.

There is no doubt that such conduct is immoral in political ethics and to be severely condemned, and yet in European diplomacy there are a number of conspicuous instances of such conduct. The most recent is that of M. Delcassé, French minister of foreign affairs, who, being forced out of the cabinet, took his revenge by publishing in a Paris journal full details of the confiden-

[1] U. S. For. Rel. (1895) 276.

tial understanding which had been reached between the French and British governments in respect to Morocco and the proposed hostile combination against Germany. Bismarck after his fall from power made revelations of the secrets of the German chancellery in the highest degree reprehensible. The case of Count Arnim, German ambassador in Paris, was a notorious breach of diplomatic confidence which led to his arrest and condemnation by the German tribunals. In all these instances the reputation of men high in public life was stained by their betrayals of state secrets.

CHAPTER X

OTHER DIPLOMATIC OFFICIALS

In addition to the four grades of diplomatic agents recognized by the Rules of Vienna, representatives of a government are frequently sent abroad on missions of various kinds, some of whom possess diplomatic functions and privileges. Others are sent in a purely private and unofficial character so far as their relation to foreign governments is concerned. A review of some of the more important of these missions appointed by the United States will indicate the nature of their functions and their relation to diplomacy.

The first diplomatic commission appointed by the United States was named in the year of the declaration of independence, 1776, and was composed of Benjamin Franklin, Silas Deane, and Thomas Jefferson. The latter not being able to accept, his place was filled by Arthur Lee. This commission was appointed by the Continental Congress "to take charge of American affairs in Europe, and to procure a treaty of alliance with France." Of this class were the commissioners to negotiate peace and conclude war. The first peace commission of the United States was that which met a similar British commission in Paris, in 1782–83, to negotiate for independence. This commission consisted of John Adams, Benjamin Franklin, John Jay, Henry

Laurens, and Thomas Jefferson. The latter was not able to act, and Mr. Laurens, being captured en route, arrived only in time to join in signing the treaty. The commissioners who assembled at Ghent in 1814 to conclude the war of 1812 with Great Britain were John Quincy Adams, James A. Bayard, Henry Clay, Albert Gallatin, and Jonathan Russell. Our third foreign war was with Mexico, and a single commissioner, Nicholas P. Trist, negotiated the treaty which adjusted the terms of peace. Our fourth and last foreign war, that with Spain, was concluded by a commission of five prominent citizens, who negotiated the treaty of peace at Paris, 1898, consisting of W. R. Day, C. K. Davis, W. P. Frye, George Gray, and Whitelaw Reid.

During our history we have had several important commissions of a similar character appointed under peculiar exigencies for the adjustment of acute international questions. Of these may be named the two commissions of 1797 and 1799 sent to France to avert the war which was most imminent, the first composed of C. C. Pinckney of South Carolina, John Marshall of Virginia, and Elbridge Gerry of Massachusetts, and the second of Chief Justice Ellsworth, W. Vans Murray, minister to the Netherlands, and W. R. Davie of North Carolina, among the leading statesmen of their day. Of a like character and object was the joint high commission which assembled in Washington in 1871, to adjust the heated and delicate questions which had arisen with England, having their origin in the Civil War. The American members of the commission were Secretary Fish, General Schenck, minister to Great Britain, Justice

Nelson of the Supreme Court, and Attorney-General Williams. A similar commission was that which met in Washington in 1888 to undertake the settlement of the long-pending and perplexing question of the northeast (Canadian) fisheries, composed on the part of the United States of Secretary Bayard, Judge Putnam, and Dr. Angell, and on the part of Great Britain of Joseph Chamberlain, the British minister to the United States, and the Canadian prime minister. The last commission of this character was the joint high commission of 1898, for the adjustment of pending questions with Canada, composed on the part of the United States and Great Britain of six members each.

In all these cases the commissioners were named in their credentials as envoys and ministers plenipotentiary or as commissioners plenipotentiary, and were accorded the diplomatic privileges of that rank. In their relation to each other they took rank in the conferences in the order in which they were named by the President.

Early in the history of the United States the question was raised as to the immunities enjoyed by commissioners sent abroad in execution of treaty stipulations or on other public business. In 1796 Messrs. Gore and Pinkney were sent to London to act as commissioners under the Jay treaty of 1794 to adjudicate claims. On arrival they were required to pay duties at the custom house, and their houses were visited by officials for militia register and tax purposes. They reported the facts to the American minister, Mr. King, claiming that under the law of nations they were entitled to exemption from such demands.

The minister brought the subject to the attention of the foreign office, and the latter took the opinion of the law officers of the government, who were the eminent jurists Lords Stowell, Eldon, and Redesdale. They held that, as they did not have letters of credence to the King, they did not possess the character of diplomatic officials, and hence were not under British law entitled to the immunities of the latter.[1] This strict construction has not been followed, however, in latter years, and as a matter of international comity diplomatic courtesies are extended to such officials.

The government of the United States has several times named special ministers plenipotentiary or commissioners to negotiate treaties or to discharge other special missions at capitals where American ministers are already accredited. They have been usually associated in their duties with the ministers resident, but there is one notable exception to this rule, that of John Jay in 1794 to London. Our relations with Great Britain were in such a critical condition that President Washington felt it necessary to make an extraordinary effort to bring about a peaceful solution. Although there was an able and honored representative in London, he appointed John Jay, at the time Chief Justice of the Supreme Court of the United States, a sole plenipotentiary to King George III, and clothed him with full powers to negotiate on all pending questions. James Monroe was named by Jefferson in 1803 joint plenipotentiary with Livingston, the minister at Paris, to negotiate for the cession of Louisiana; and when Monroe

[1] History and Digest of International Arbitrations, John B. Moore, 345.

himself was minister in London, in 1806, William Pinkney, of Maryland, was sent as minister plenipotentiary, associated with him, to bring about an adjustment of our differences with Great Britain.[1]

In 1818 Albert Gallatin, then minister in Paris, was sent to London to negotiate a treaty in conjunction with the resident minister, Richard Rush. In none of these instances was the coming of a special negotiator looked upon with gratification by the resident minister. In the case of Mr. Jay the minister, Mr. Pinkney, confessed to "an unpleasant feeling on the occasion," but he cheerfully rendered all possible assistance. Messrs. Livingston and Monroe had a sharp controversy over the merits of their respective services, and when the situation was reversed in London Monroe was chagrined at the coming of Mr. Pinkney. Gallatin and Rush were intimate friends and negotiated in harmony and successfully, but the biographer records that for the resident minister it is "always a somewhat delicate act, the intrusion of a third person in his relations with the government to which he is accredited." [2]

Among other special missions of this character may be mentioned that of General Schenck, when minister to Brazil, appointed in 1854, in conjunction with the American minister at Buenos Ayres, to negotiate treaties of commerce, etc., with the Argentine Republic; General Sickles, in 1867, sent to Colombia to secure an agreement jointly with the resident minister, as to the passage of troops across the Isthmus of Panama;

[1] Foster's American Diplomacy, 160, 195, 205.

[2] Life of Albert Gallatin, by Henry Adams (1879), 569.

and Caleb Cushing, to the same country in 1868, as to the isthmus canal.

As indicating the character of the duties American representatives abroad are sometimes called upon to discharge, it may be noted that George W. Erving was appointed special minister to Denmark in 1811, charged with the subject of the spoliations committed under the Danish flag on American commerce; and associated with him were the consul at Copenhagen, the minister to Russia, and the chargé to the Netherlands. Other similar conferences might be cited. Probably the most famous of such conferences was that held at Ostend in 1854 between Mr. Buchanan, minister to Great Britain, Mr. Mason, minister to France, and Mr. Soulé, minister to Spain, to concert a plan for the acquisition by the United States of the island of Cuba, resulting in the fruitless "Ostend manifesto."[1]

A somewhat unusual diplomatic mission was that intrusted by President Fillmore to Commodore Aulick in 1851 and transferred to Commodore Perry in 1852, who, going with his fleet and bearing a commission as special plenipotentiary to Japan, negotiated in 1854 the first treaty ever made with that country, which resulted in opening it to the world. A similar mission and honor was conferred on another officer of the navy, Commodore Shufeldt, who in 1882 made the first treaty with Korea, which likewise opened that country to foreign intercourse. In this case, also, the negotiator was attended with a naval display. Other diplomatic missions have been intrusted to officers of the navy, such as that

[1] Foster's American Diplomacy, 345.

of Captain Fox, assistant secretary of the navy, who bore to the Emperor of Russia in 1866, in one of the iron-clad ships of our Civil War, the joint resolution of Congress congratulating the Czar on his escape from assassination, a service which would have been performed in the ordinary way by the resident minister, except that the friendly interest shown by Russia to the Union called for special recognition.

Commissions have been created of a quasi-diplomatic character, but without a diplomatic standing, and bearing no credentials to a foreign government. Of this class was the commission composed of three citizens, appointed by President Monroe in 1817, to inquire into the condition of the South American colonies then under revolt from Spain, with a view to a decision as to the recognition of their independence.[1] Similar in character was that appointed by President Grant in 1871, to visit San Domingo, after the negotiation of the treaty of annexation, to inquire and report on the condition of the country and the sentiments of the people.

The government has at various times appointed special agents, sometimes of a secret character, to go abroad on special missions or to accomplish a particular duty. They seldom have any credentials, and are usually without any diplomatic standing. One of the first of this character was the appointment of Gouverneur Morris as private agent to London in 1789. John Adams had closed his mission under unfavorable circumstances, and as there was no disposition manifested by Great Britain

[1] For report of South American Commission, 4 American State Papers, For. Rel. 217.

to send a minister to the United States, President Washington was not willing to name a successor in the post. The relations were, however, of such a grave character that he felt it to be his duty to make an effort to reach a better understanding. He therefore sent Mr. Morris, then in Europe, a letter accrediting him as a private agent, authorizing him, but "without giving him any definite character, to enter informally into conferences . . . with the court of London." Mr. Morris held conferences with the prime minister and the secretary for foreign affairs, and exchanged notes with the latter, but was unsuccessful in his efforts.[1]

One of the most noted instances of the class of private agents was the designation of A. Dudley Mann by President Taylor in 1849, under secret instructions to proceed to Hungary for the purpose of obtaining accurate information, with a view to the acknowledgment of its independence. Coming under this class may be mentioned the mission of Commissioner Blount sent by President Cleveland to Hawaii in 1893 "to report on the present status of affairs in that country." His was a unique mission in that, while there was in Hawaii a regularly accredited American minister, Mr. Blount bore letters of credence to the president of that republic, and was given "paramount authority" in all matters touching the relations of the government of the United States to the government of the island and the protection of American citizens. The resident minister was notified by the secretary of state that while Mr. Blount was "paramount," he was "requested to continue until fur-

[1] 1 Am. State Papers, For. Rel. 121.

ther notice in the performance of your [his] official functions, as far as they may not be inconsistent with the special powers confided to Mr. Blount." As might have been anticipated, this relation was soon terminated by the resident minister vacating his office.[1]

Another case occurred in 1886 with similar results. A special commissioner was appointed by the President to investigate the arrest of A. K. Cutting in Mexico, although the American minister was a person of ability and experience, and, being a well-trained lawyer, was well fitted to deal with the case, which was entirely of a legal character.[2] The special commissioner, on his arrival in the City of Mexico, assumed an air of considerable importance and secured notoriety in the newspapers. The minister, Mr. H. R. Jackson, affronted at his treatment, resigned his post and returned home. The Senate requested the correspondence on his resignation, but the President declined to give it, as not compatible with the interests of the public service.[3]

The last of the non-diplomatic agents to be noticed are those who were sent to Europe during our Civil War. In October, 1861, Secretary Seward, with the approval of the President and cabinet, dispatched Archbishop Hughes, Bishop McIlvaine, and Thurlow Weed on a confidential and secret mission, for the purpose of influencing, as far as possible, public sentiment in respect to the war. During the same period W. M.

[1] S. Ex. Doc. 45, 52d Cong., 1st Sess. 1276.

[2] For correspondence as to the Cutting case, U. S. For. Rel. 1886, 1887, 1888, Mexico.

[3] S. Ex. Doc. 109, 49th Cong., 2d Sess. 2.

Evarts was sent to London to aid Mr. Adams, the minister to Great Britain, in the legal questions growing out of the war; and R. J. Walker, former secretary of the treasury, was also dispatched to Europe to assist in the financial operations of the government.[1]

The manner of the appointment of these commissioners and agents and their compensation, at various times, have been the subject of discussion in Congress and the press. An examination of the facts in the cases noticed will show that the practice of the executive department of the government as to nominations has not been uniform. The names of the commissioners appointed to adjust the difference with France in 1797 and in 1799, as also those on the peace commission of 1814, were submitted to the Senate for confirmation. The name of the peace commissioner to Mexico in 1849 and those of the Spanish peace commissioners of 1898 were not sent to the Senate. Those of the South American commissioners of 1817 and those of the San Domingo commissioners in 1871 were not sent to the Senate. That body was asked by the President to confirm the nomination of the members of the joint high commission of 1871, but not that of 1888 (fisheries), nor of the joint high commission (Canadian) of 1898.

As to special plenipotentiaries, Mr. Monroe, sent to Paris in 1803, and Mr. Pinkney to London in 1806, were both confirmed by the Senate. The names of Commodores Aulick, Perry, and Schufeldt were not sent to that body.

[1] As to Mann's mission and the civil war agents, see Foster's American Diplomacy, 329, 396.

The Senate, in advising the ratification of the treaty negotiated by Commodore Shufeldt with Korea, attached to it a declaration that it did "not admit or acquiesce in any right or constitutional power in the President to authorize or empower any person to negotiate treaties or carry on diplomatic negotiations with any foreign power, unless such person shall have been appointed for such purpose or clothed with such power by and with the advice and consent of the Senate." [1]

The practice has been to appoint arbitrators and agents of international commissions without senatorial confirmation.

An item of $30,000 was inserted in the diplomatic appropriation bill to meet the expenses of the South American commission of 1817, but it was objected to and stricken out in the House on the ground that the appointment of the commissioners was not submitted to the Senate for confirmation, and that the commission was unauthorized. Henry Clay was especially conspicuous in criticising the action of the President. To avoid establishing a precedent for paying persons unofficially appointed by a specific appropriation, it was finally agreed that the sum asked for should be allowed in the shape of a contingent fund.[2]

The question of the confirmation of a special commissioner was again raised during the investigation of Hawaiian affairs in 1894 by the senate committee on foreign relations. The chairman of the committee, Mr.

[1] Compilation of Treaties in Force, 1904, 495.

[2] 3 History of the United States, Schouler, 28, 32 ; 1 Wharton's Digest, 583.

Morgan, in his report, said: "A question has been made as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions without dissent on the part of Congress. These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents." The views of the minority, signed by senators Sherman, Frye, Dolph, and C. K. Davis, held "that the appointment, without the advice and consent of the Senate, of Hon. James H. Blount as 'special commissioner' to the Hawaiian Government under letters of credence and those of instruction, which declared that 'in all matters affecting relations with the Government of the Hawaiian Islands his authority is paramount,' was an unconstitutional act, in that such appointee, Mr. Blount, was never nominated to the Senate, but was appointed without its advice and consent, although that body was in session when such appointment was made."[1] This review shows that the earlier practice, by those nearest to the framers of the Constitution, was to submit diplomatic appointments to the Senate for confirmation; but the weight of precedents seems to sustain the right of the President to make appointment of special commissioners and plenipotentiaries independent of the Senate.

[1] S. Report, 53d Cong., 2d Sess. 25, 33.

It has frequently happened that public officers have been appointed to serve on international commissions or as special plenipotentiaries. It raises the question whether compensation for such service can properly be paid to them. The question first arose in the case of Mr. Jay, who held the office of Chief Justice of the Supreme Court of the United States when he was appointed and discharged the duties of special envoy to Great Britain. During that service he was paid his salary as chief justice and his *actual expenses* on the mission.[1]

The question again arose on account of the services of Chief Justice Ellsworth, who was a member of the commission to France of 1799. He appears to have made claims to compensation for the two duties. Secretary of the Treasury Gallatin held that he was "not entitled to receive at the same time two salaries for the two offices of chief justice and envoy extraordinary. . . . It follows that the mode in which the account should be presented and settled is that adopted in the case of Mr. Jay's mission." [2]

[1] 8 Jefferson's Writings, 130.

[2] The full opinion of the secretary is as follows : —

TREASURY DEPARTMENT, June 11, 1801.

SIR : Upon an examination of Mr. Ellsworth's letter and account, it appears to be the Comptroller's opinion, and I coincide with him, that Mr. Ellsworth is not entitled to receive at the same time two salaries for the two offices of Chief Justice and Envoy Extraordinary ; that from the nature of the office of Chief Justice, so long as he did not resign it, or by any inability vacate it, the salary must necessarily according to the Constitution and law be paid to him, and that his having received that salary till after his resignation amounts to an election on his part of taking it.

Should that opinion be correct, it follows that the mode in which the account should be presented and settled is that adopted in the case of Mr. Jay's mission. But perhaps it would be better in the first place to

The question was finally put at rest by the statute of March 3, 1839 (Rev. Stat. sec. 1756), which prohibits all officers in any branch of the public service from receiving any additional pay or allowance for any other service whatever. It is the practice of the government to allow public officers who serve on international commissions or on special diplomatic missions their actual expenses, a fixed per diem, or a specific sum to meet their outlay on such duty.

It is usual to secure from Congress a lump sum appropriation to cover the expenses of international commissions, which is disbursed by the Department of State. The secretary of state decides upon the compensation or allowances to the various members of such bodies. In cases of emergency, or when the expense is not great, it is met from the contingent fund of the department.

The persons who constitute or are attached to an embassy or mission of the United States, in addition to the ambassador or minister, may be enumerated as secretaries, naval and military attachés, clerks, interpreters or dragomen, and occasional bearers of dispatches. The term "the Secretary" is understood to refer to the actual first secretary, and the others are designated as second and third secretaries. The manner in which secretaries are appointed and admitted to the service has already been described.

suggest those ideas to Mr. Ellsworth before a formal opinion is given by the accounting officers on his account.

I have the honor to be, very respectfully, sir, your obedient servant,

ALBERT GALLATIN.

THE SECRETARY OF STATE.

Under the Printed Instructions of the department and the letter which accompanies the notice of appointment, it is made the duty of the secretary to transcribe and dispatch the official communications of the mission; to record or copy them in suitable books; to make the necessary classification and indexing; and to have the general charge and care of the archives and property of the mission. He is habitually to attend the office of the mission during the usual hours of business, and in a general way be subordinate to the head of the mission, although it is recognized that the general duties of the office are from their nature scarcely susceptible of a minute definition, and must in a great measure be determined by circumstances. The duties as described by the regulations of the British diplomatic service, which may well be applied to the United States, are as follows: "The Secretary of Embassy or Legation must be deemed to hold, as regards the Chief of the Mission, the same position which our Under Secretary of State holds as regards the Secretary of State, and therefore the whole public business of the Embassy or Mission should pass through his hands, and, subject to the orders of the Chief, should be carried on under his superintendence. The public and official dispatches and papers will, if not opened by the Ambassador or Minister himself upon their arrival, reach him through the Secretary; and the direction of the Chief in regard to all matters of public business will pass through the Secretary, and be executed under his superintendence and control."

From the fact that the first secretary of an embassy or legation of the United States is required to take the

place of the ambassador or minister in the latter's absence, he should possess the intellectual and social qualifications of his chief; and hence he should make himself acquainted with the policy and public men of the country of his residence, and maintain intimate relations with the diplomatic corps. When an ambassador or minister for any reason absents himself from his post, before his departure he presents the secretary, either in person or by note, to the minister of foreign affairs as chargé d'affaires *ad interim*, and the latter assumes all the functions of the mission. A recent circular instruction of the Department of State requires that either the head of the mission or the secretary shall be always at his post, and that if an emergency arises requiring the mission to be left under the temporary direction of the second or third secretary the department shall be first consulted.[1] Upon the death of an ambassador or minister, the secretary *ipso facto* becomes chargé. During his service as chargé he is entitled by law to compensation at the rate of one half the pay of his chief.

Secretaries of legations are authorized to administer oaths, take depositions, and generally to perform national acts (Rev. Stat. sec. 1730). These services are usually discharged by consuls, but it is sometimes more convenient to resort to the secretaries, and they are expected as a general rule to comply with the request for such services.

The secretary is regarded in international law as a diplomatic representative, and is entitled to the privi-

[1] U. S. For. Rel. 1902, 5.

leges and immunities of such representative. No special ceremony attends his arrival at his post other than that he is presented by his chief to the minister for foreign affairs, and to his colleagues of the diplomatic corps; and upon the first diplomatic or public reception of the court he is presented to the chief of the state. The duties of second and third secretaries are, in general, similar to those of a first secretary, whom they assist in the work of the mission; and they, in turn, become chargé d'affaires *ad interim* in the absence of both the head of the mission and the secretary.

It was formerly the practice in the diplomatic service to have as members of missions a number of young men called attachés, who served the government without pay, being attracted to the service because of the experience in public affairs gained thereby or the social attractions attending the position. Lord Crowley, before the British Parliamentary Committee from whose report I have already quoted, said: "At the beginning of the present century, the only assistance afforded by the Government to the chief of an embassy or mission was that of a secretary, but the ambassador or minister was allowed to name a certain number of individuals who on his recommendation were recognized as attached to him, and whom he could employ in the public service as he might deem useful. The post of an attaché was constantly filled in those days by young men of family and future who desired to pass a few months agreeably abroad."

This practice was adopted by the United States and followed for some time. Mr. Cushing, the first minister

to China, took with him five attachés, upon the suggestion of Secretary Webster, who wrote, "It will add dignity and importance to the occasion, if your suite could be made respectable in number, by accepting such offers of attendance without expense to the government." Owing to its abuse, the practice of allowing attachés has been abolished by Congress, and such appointments are no longer made by any diplomatic officer of the United States. It still exists with most nations, but the attachés are usually required to pass an examination, receive an appointment from the government, and regularly enter the service.

Respecting the abolition of the practice by Congress, Mr. Dallas, minister in London, makes the following observations: "The mischief against which the law is aimed had long been noticed at the Department of State, and was often embarrassing to our diplomatic representatives. Under the old usage, unpaid attachés might be created without stint as to number; and a train so composed was thought, and justly thought, to give éclat to a mission. Now it frequently happened that the minister, always conscious of the invidious nature of selecting from his young countrymen, preferred giving his appointments without discrimination and to every one who asked. American attachés became as plentiful as blackberries, and sometimes deranged by their intermeddling the business of, or by their deportment, threw discredit upon, the legation. Congress, moved no doubt by the Secretary of State, Governor Marcy, who was pitiless against showy pretensions, struck at the root of the evil, by an express prohibition.

I have occasionally wished to possess the discretion; but, on the whole, perceive many inconveniences in which I should be involved by it, and have therefore no reluctance in strictly complying with the law."[1]

In recent years the United States has adopted a custom, established by the military powers of Europe, of sending abroad officers of the army and navy to study and report to their respective departments the progress made in military and naval matters, to attend the manœuvres, and witness the movements of armies and squadrons in time of war. Officers, when designated by the respective departments, are commissioned by the secretary of state, assigned to reside at the leading capitals where missions are established, and notice of their designation is given the resident government by the ambassador or minister. Though they are attached to the mission, they are not under the direction of its chief, and report directly to the heads of their own departments. In ceremonial representations the naval and military attachés form a part of the official staff of a mission, and take precedence according to their rank, those above a captain in the navy or colonel in the army having place above the secretaries, and those of lower rank next below the first secretary.

In a number of missions clerks are employed, but they have no official rank or position and no immunities except as members of the minister's household, nor can they perform any diplomatic functions. In oriental countries there is attached to each of the legations an official interpreter, the one in Turkey being known as

[1] 2 Dallas's Letters from London, 128.

"dragoman," and he is quite an important personage in the legation.

By recent acts of Congress ten "student interpreters" at the legation in China and six at the embassy in Japan have been authorized. They are to be citizens of the United States, their selection is to be made nonpartisan so far as may be consistent with aptness and fitness for the intended work, and it is made their duty to study the Chinese or Japanese language with a view to supplying interpreters to the legation and consulates in China and Japan, and they are required to sign an agreement to continue in the service for a period of ten years.[1]

Every foreign office publishes at intervals a diplomatic list, that of the Department of State appearing monthly, which contains the names of the members of the missions in the order of rank of the chief, as also of their wives and daughters. In former times in Europe female ambassadors or special envoys were not unknown in the diplomatic service,[2] but in modern times no such distinction has been awarded the fair sex. However, they enjoy many of the immunities of the diplomatic service and marked social privileges. In most of the royal courts of Europe the wives of both ambassadors and ministers are honored with the title of "Her Excellency;" and they usually receive and return calls from the wives of heads of departments, esteemed there a great mark of attention. Mr. Monroe, when secretary of state, found the omission of this courtesy a cause of complaint to the

[1] Acts of Congress, approved March 12, 1904, and June 16, 1906.

[2] Embassies and Foreign Courts, London, 1855, 102.

resident representative of a European court, and took occasion to note the uniform rule of the heads of the government at Washington, whose "wives return every visit of the wives of foreign ministers." [1]

In addition to the foregoing there is still another person often attached to missions, the bearer of dispatches or official messenger. In former times governments were accustomed to maintain a regular staff of such public servants, and they formed an important part of a legation, but they have lost much of their value and are now seldom made use of by the diplomatic officers of the United States. A century or two ago, when the mail service was very meagre and imperfect or did not exist at all, and even later when the sacredness of correspondence was not properly recognized in the mails, there was urgent need of official messengers between a government and its missions abroad. Under international law these officials are entitled to free and unobstructed passage, and the seals of their bags or pouches are inviolate.

The government of the United States does not maintain any such persons regularly in this service, but the heads of missions are authorized to employ special messengers whenever in their judgment the interests of the public service require it. They are usually employed to carry home treaties after being signed, and in time of war.

The growing disuse of special messengers is another proof of the improved morale of governments respecting the diplomatic service in these latter days. I have

[1] 1 Wharton's Digest, 705.

elsewhere noted the embarrassments under which the American representatives of the Revolutionary period labored respecting their correspondence, it being at that period regarded as a proper method of circumventing diplomatic efforts to violate the correspondence in the mails and in the offices of ministers. The Continental Congress so far yielded to the practice as to authorize the secretary of foreign affairs to exercise supervision of the mails.[1] A story is told illustrative of the shamelessness of the practice. The French ambassador of the time made complaint to the British secretary for foreign affairs, the Duke of Newcastle, that the dispatches sent him from France had been not only opened, but were actually forwarded on to him sealed with the royal arms of England!

"It was in consequence of a mistake at the Foreign Office," replied the duke, laughing at his infamy as a good joke.[2]

The last of the great congresses attended by the emperors and kings was that of Vienna in 1815, which probably eclipsed all others in the matter of attendance of royalty and display. From an interesting account of that memorable congress, recently written by a competent author,[3] the following extract is made, showing the extent to which correspondence was violated: —

"Every tolerably prominent official person was under surveillance, and every day the Minister of Police collected reports to put before the emperor. Thus arose the ac-

[1] Foster's American Diplomacy, 26, 92, 98.

[2] Embassies and Foreign Courts, 137.

[3] The Vienna Congress, by Professor August Fournier, in The International Quarterly, New York, January, 1905.

tivity of the 'Secret Cabinet,' a board of magistrates which, at that time, when a respect for the privacy of letters was not yet current, overlooked the correspondence in the European states. Whatever the post or the express offered in the way of letters of official personages, and all that could be obtained from couriers, was 'intercepted' — that is, opened, read, copied, and forwarded — sometimes the last did not happen. In this regard the Board was indeed no respecter of persons. The Emperor's own brothers and sisters, the Empress Marie Louise, his daughter, the foreign sovereigns, princes and princesses, to say nothing of diplomats, all were under the surveillance of the 'Secret Cabinet,' so that important letters must be forwarded by personal conveyance if they were to remain unmolested. . . . And not only the finished dispatched letters, but also the unfinished conceptions or bits of writing which were intended to be destroyed, interested the police. The paper baskets of the foreigners were searched through by spies. The documents which had been torn to bits were put together and were called 'chiffons;' indeed the half-burned contents of the chimney-place made their way to the Board and were zealously — if indeed with only occasional success — examined for State secrets. A large part of these documents has been preserved, and though we may condemn the government methods of a reactionary time, as they deserved, yet it is not to be denied that they now help us to satisfy our interest in things past."

How far a government at the present day is justified in making use of correspondence which falls into its hands by other than the usual course is not clearly

established. We recall that Dr. Franklin was driven from England because of the use he made of letters irregularly obtained, and so recent an authority as Lecky, the historian, holds him guilty of fraudulent and corrupt conduct. This I regard as an unjust judgment, but it shows the strength of public sentiment on the subject. On the eve of the Spanish war in 1898 a letter, supposedly purloined from the Havana post-office, came into the hands of the Department of State, signed by the Spanish minister in Washington. It spoke in contemptuous terms of the President and of the motives influencing his conduct. The minister was confronted with the letter by an official of the department, and unhesitatingly admitted its genuineness. Whereupon all intercourse with him ceased, and he was given his passports. The action of the department was criticised in some quarters as a breach of the inviolability of the postal service.

The ancient method of secret cipher for concealing correspondence is still followed in the Department of State as well as in all other civilized governments. This cipher is furnished to the embassies and legations, and is in frequent use between them and the home government. It is scarcely possible to construct a cipher which cannot be translated, and governments understand this fact. Its use is resorted to mainly for the purpose of concealing official messages from the telegraphic operators who handle them and from the general public. In time of war they are fair game for the enemy, and in critical periods they are a great temptation to a not over-scrupulous government.

CHAPTER XI

THE CONSULAR SERVICE

The establishment of consuls as a permanent class took place several centuries before the practice of maintaining embassies or legations became general. As a class of international officials it had its origin after the Crusades and when the Eastern Roman Empire was in its decay, at the period when Venice and other Italian states were assuming commercial importance. It arose, in fact, out of the differences of law and religion in the cities of the Levant, where the Italian commercial states maintained colonies or had large mercantile interests, the affairs of which were administered by consuls or consul-judges, and at that time their functions were largely of a judicial character, the name being traced back to the Roman consuls. With the check given to the power of the Ottoman rulers and the development of commerce in Western Europe the character of the service was materially changed, and the custom of appointing consuls was extended to the reciprocal exchange of such officials among the Christian nations. Their judicial powers were much restricted, their commercial functions became greatly enlarged, and they assumed the character by which they are now recognized in international law.

The United States early in its history accepted the system as established under the practice of nations, and has done much to bring order out of the confused state

in which the system existed when this country entered the family of nations. Its first treaty with a foreign power ratified after the adoption of the Constitution was a consular convention with France, and it has been the most active of the nations in negotiating such conventions, and in securing for consuls recognized place and functions under international law. Although no law of Congress had been passed creating the system at the time, the Federal Constitution recognized the international character of consuls, and President Washington had appointed fifteen such officials before the enactment of the law of 1792 on the subject. While the executive department has been so efficient, Congress has been slow to adopt the necessary legislation for a proper organization of the system. This was left entirely to the discretion of the Department of State until the law of 1856 was passed, which was the first attempt by the legislative department to provide an organic act for its regulation.

The government began by appointing unpaid consuls from American merchants residing abroad, or, if they were sent from America, they were allowed to engage in business as an equivalent for salary. Although this was found to work badly, no change occurred, and up to 1856 the consuls were paid in fees received by them. Under the acts of that and later years most of these earlier abuses have been removed and the system established upon a better basis.

The principal grades in the consular service of the United States are as follows: —

Consuls-general. Consuls.

Subordinate to these are: —

Vice and deputy consuls-general.	Consular agents.
Vice and deputy consuls.	Consular clerks.

In addition to these, the Fifty-ninth Congress provided for the appointment of five inspectors of consulates to be designated as consuls-general at large.[1]

Consuls-general of the United States have usually a supervising jurisdiction over the consuls in the country to which they are accredited, but to this rule there are some exceptions. Of recent years more than one consul-general has been appointed in China and some other countries, rather to secure equality of treatment with other foreign consuls than on account of the exigencies of commerce. Consuls-general and consuls are appointed by the President and confirmed by the Senate. Vice and deputy consuls-general and consuls are recommended by their chiefs, and are commissioned by the secretary of state; the first-named act only in the absence of their chiefs, but the deputies assist their chief in a subordinate capacity in the place where the latter's office is located, and have no power to perform a public official act. Consular agents are nominated by the consuls, are commissioned by the secretary of state, and act as the representative of their chief at other commercial places within their district. Consular clerks are appointed by the President; they are by law limited in number to thirteen; they cannot be removed from office except for cause; and are assigned by the secretary of state to such consulates as he may think the service requires, to act subordinate to the principal consular

[1] Act of Congress, April 5, 1906.

officer at the post. There are also what are termed merchant or commercial consuls, being those receiving a salary not exceeding $1,000, the limit at which a consul can by statute engage in business. In most countries vice-consuls are included in the regular consular grade, and not merely acting during the absence of the chief, as in the United States.

When a consul-general, or consul, is appointed, he is required to take the prescribed oath of office and file with the department a bond, in a sum fixed by the secretary of state, which in no case shall be less than his annual salary. A diplomatic officer is not required to give a bond when he enters upon his duties, but it is made necessary in the case of a consul because of the receipt by him of public moneys and of his control of the property of citizens. Like an envoy, he is granted not exceeding thirty days' time awaiting instructions and preparing for his post, and a liberal allowance for "traveling time."

It is the policy of the government not to appoint foreign subjects as consular officers, and this is rarely done, and then only at places without fixed salaries and where the services of citizens of the United States have not been available. It is also the policy of the government not to appoint naturalized citizens to consulates within the country of their nativity, although it has not been invariably observed. The conclusion of Secretary Fish was that the experience of the government had demonstrated the inconvenience and often serious embarrassment resulting from such appointments.[1]

1 Wharton's Digest, 761.

Mr. Eugene Schuyler, who had large experience in the service, says: "No person who has lived abroad or has had to do with consular business, whether as an official or as a client, can for a moment doubt that the interests of the United States would be better served had native-born citizens been appointed to these posts" (places filled by naturalized citizens in the country of their nativity). He adds: "It cannot be expected that a government will cheerfully accept as consul a man, no matter what his abilities may be, who has emigrated on account of political difficulties, or who has gone away in order to escape the conscription." [1]

Upon his arrival at his post a consul must report the fact to the minister of the United States in the country. The commission of a newly appointed consul is not sent directly to him, but is transmitted by the secretary of state to the minister of the United States in the country where his post is located, in order that the latter may apply to the minister for foreign affairs for an exequatur for the consul. This is an instrument or decree whereby a sovereign or chief of state authorizes a foreign consul to discharge the functions which are confided to him, and is the evidence of his official character to the local authorities in his consular district. In the United States this instrument is signed by the President, sealed with the Great Seal, and countersigned by the secretary of state, and announcement of its issuance is made in the public press. Such is the custom of most governments, but in some countries the consul is merely notified through his minister that he is recognized as

[1] Schuyler's American Diplomacy, 8081.

consul, and in one at least it is the practice simply to write the word "exequatur" across the commission. The exequatur when issued is forwarded to the consul with his commission, and upon its receipt he is prepared to act officially. Sometimes, however, it occurs that there is a delay in the issuance of the exequatur, as in the case of consuls appointed to distant colonies, and, upon application of the minister of the United States, the minister for foreign affairs authorizes him to act pending its receipt.

In respect of the appointment of consuls the practice of the Chinese government differs from that of most nations. As already mentioned, the Chinese minister at Washington is likewise accredited to the republics of Mexico, Cuba, and Peru. He brings with him a numerous suite, out of which he selects consuls-general and consuls and the subordinate officials for all the consulates in the United States, including Hawaii and the Philippines, Mexico, Cuba, and Peru. He furnishes each of them a commission signed and sealed by himself, and the commission is the basis of the exequatur issued by the government of the United States.

Every government has the right to refuse an exequatur, but the withholding of it is an extreme act, and is rarely resorted to by the United States. It is, however, not uncommon with European nations. As indicating the reasons which justify such action, it may be noted that in recent years the Turkish government refused an exequatur to an American consul at Beirut because he was a clergyman and might be too intimately connected with the Protestant missions; and another was

refused by Austria on account of his political opinions, the consul having previously been an Austrian subject. The withdrawal of the exequatur, which may be made by the issuing government at any time, operates as a dismissal of the consul, as he can no longer exercise his duties.

When he enters on his office a consul-general gives notice to the Department of State and to the diplomatic representative, and consuls notify the department and the consul-general. In much the same way as an envoy the consular officer enters upon his duties, calling first upon the authorities of the post or place where his office is located and upon his consular colleagues, receiving from his predecessor the records, archives, and property of the consulate and taking an inventory of the same. He is required to reside in the place where his office is located, which must be conveniently situated, and it is forbidden to have the same in the counting-room or place of business of a banker, merchant, manufacturer, or other like person, in order to avoid all suspicion of undue influence in the discharge of his official duties. The consular district is marked out by the Department of State, in order that there may be no conflict of jurisdiction with neighboring American consuls.

The duties of a consul may be negatively stated to be not of a diplomatic character. He may have frequent occasion to hold relations with the local authorities respecting the protection of American citizens and their interests, but all diplomatic intervention must be made through the resident minister, to whom the consuls will report each case as it arises. Occasionally, in the absence

of both the minister and secretary, a consul is appointed chargé *ad interim* of a mission, but not without the special authority of the secretary of state and the consent of the minister of foreign affairs of the country where he resides. His duties as such are not discharged in virtue of his consular capacity, but of the special authority given by the secretary of state.

The duties of a consular officer of the United States are mainly commercial, but are of such a multifarious and varied character that I can state them only in general terms, and must refer to the Printed Consular Regulations for fuller information which is there set forth in great detail, constituting a volume of over eight hundred pages. The duty which most absorbs the time of an American consul in a commercial post is that which has relation to the tariff system. This system, because of its exacting requirements and intricacy, imposes upon the American consular officer many duties not incident to the same service of many other countries. A few only of these can be noticed here.

All goods intended for importation into the United States must be accompanied by invoices sworn to and certified by the consul at the port of shipment. The object of the consul's interposition is to aid the customs authorities in verifying the correctness of the invoice and to prevent frauds upon the revenue. This presupposes on the part of the consul a large knowledge of the state of the trade and of values at the locality of his residence, which cannot be acquired without close attention and study.

He has other duties as to imports, among which are

certain acts respecting some classes of articles which are entitled to free entry; also as to returned American merchandise which has been shipped abroad. Goods imported but not entered for consumption and American products exported to avoid the payment of the internal revenue tax are allowed to be shipped under bond, and the consul is required to furnish landing certificates that they actually reached his port. He has certain exacting duties as to the inspection and sealing of cars from Canada destined for a port of entry not on the frontier; he must see that manufactured goods shipped from his port have the marks of origin properly stamped upon them; and that goods the product of convict labor, prohibited by law, are not exported to the United States.

Various duties are imposed upon consuls respecting American shipping. Every vessel engaged in commerce, registered in the United States and flying the American flag, must upon arrival in a foreign port deliver what are termed "the ship's papers" to the consul there stationed. These embrace the certificate of register, the crew list, and shipping articles. They are retained in a safe place by the consul while the vessel remains in port, and are not redelivered to the master until he produces the clearance of his vessel from the proper officer of the port, and shall satisfy the consul that he has discharged all his obligations to his seamen and in the port.

He must receive all "protests" which are offered him by the master, seamen, or passengers of an American vessel arriving in his port. This is a technical term

applied to any statement relating to the events of the voyage, affecting the ship, cargo, or inmates, and when properly certified by the consul is given special faith in the courts of the United States.

Before a vessel, whether American or foreign, sails for a port of the United States, the consul must see that the ship's "manifest" is such as is required by the laws of the United States. This is a document for the information of the customs officer of the port of arrival, giving the separate items of the vessel's cargo, the names of the consignees, a list of passengers, their baggage, and other items.

A further duty respecting the shipping is to keep in the consulate, in a conspicuous place, the pilot charts and all notices to mariners published by the hydrographic officer of the Navy Department, and also all information of benefit which shipmasters may furnish to the maritime community at large. The consuls also are expected to communicate at once to the Department of State any information they may obtain of value to the seafarer or tending to decrease the dangers of navigation. In case of wrecked and stranded American vessels within his district, the consul must render all the assistance in his power, and, in case of the loss or absence of the master or other authorized person, he should take charge of the wreck and cargo, if permitted to do so by the laws of the country.

The government of the United States regards American seamen as its special wards, and it has adopted carefully framed and detailed laws for their protection against injustice and oppression. To this end it seeks

to follow them with its guardianship on the high seas and into foreign ports. It is made the duty of a consul, upon complaint of any of the crew of an American vessel, to see that their wages are properly paid and that they are not discharged except in accordance with their contract as set forth in the shipping articles. If they are found stranded and destitute in a foreign port, the consul is authorized to afford them temporary relief, and it is made his duty to assist them in reshipment or to procure them transportation to their home port. He is to investigate any charges of mutiny or insubordination on the high sea or in port, to send back to the United States as prisoners for trial and punishment any mutineers, and to adjust disputes between master and crew.

The laws of the United States confer upon consuls jurisdiction in such cases, an American vessel in a foreign port being regarded as to its inmates as American territory. When a merchant vessel enters a port of another country for the purposes of trade it subjects itself to the laws of the place, but by the comity of nations it has come to be recognized that the discipline of the ship and acts done on board which affect only the vessel and the crew, and do not involve the dignity and peace of the port, should be left to be dealt with by the officers of the ship and according to the laws of the government to which the vessel belongs. In such cases a consul acts as a judge between the parties. These matters are, however, often regulated by treaty stipulations.

The duties of an American consul towards his countrymen as stated in the Consular Regulations are to

endeavor on all occasions to maintain and promote all the rightful interests of citizens, and to protect them in all privileges that are provided for by treaty or conceded by usage. He is to protect them before the authorities in all cases in which they may be injured or oppressed, but his efforts should not be extended to those who have been willfully guilty of an infraction of the laws. He should endeavor to settle in an amicable manner disputes in which his countrymen are concerned, but he is to take no part in litigation between citizens.

He has no authority to issue passports when stationed in a country having a resident American minister, but it is his duty to visé, or place his indorsement on, passports, which has the effect more readily to establish their authenticity in the country where he is located. He is required to keep a register of American citizens residing in his district, and a registry of births and deaths is also kept. On the death of Americans, in case no relatives or friends are present, he is to attend to their burial, report to the department, and take charge of their effects. Under similar circumstances he represents the estate before the local courts when property is left of which the courts take jurisdiction.

The duties of consuls respecting unfortunate Americans may be illustrated by a case which came under my observation during my residence in Spain. A worthy gentleman, who had creditably served our country abroad as minister, was passing the winter at the country place of a personal friend, a Spanish nobleman, in the hope of restoring his enfeebled health. In a fit of melancholia, to which he was occasionally subject, he committed sui-

cide. Upon his person was found a letter of credit for $5,000. His Spanish friends could not understand why he should want to end his life when he had such a sum of money in his pocket.

The death was reported to the department by telegraph, and instructions were received to have the consul at Malaga return his body to the United States. But meanwhile interment had taken place, and application had to be made to the minister of the interior at Madrid to obtain a suspension of the sanitary laws against disinterment. The consul then proceeded to engage a small vessel to convey the body from the near-by port to Malaga or Gibraltar, whence it could be transshipped to the United States. In this he succeeded with great difficulty, because the malediction of the Church in that country rested on suicides. But unluckily while the disinterment was being effected an earthquake occurred, not an unusual phenomenon in the region; and the superstitious sailors, interpreting this as a manifestation of Divine interdiction, refused absolutely to convey the accursed body. Not until some weeks had passed was the consul able to have a British vessel touch at the port and transport the body to Gibraltar.

Marriages often occur in the consulates, and consuls are required by law of Congress to act as a witness to the marriage when requested, which has the legal effect stated in the law; but these effects apply only to the Territories and the District of Columbia, as Congress has no power to legislate on the subject of marriage relations in the States.

The immigration laws of the United States impose quite

important duties on consuls. Under the treaty and laws respecting the exclusion of Chinese laborers from the United States, consuls are required to authenticate the correctness of various certificates issued by the Chinese officials. Persons coming to the United States under contracts to labor are forbidden to enter; so likewise are convicts, anarchists, polygamists, idiots, the insane, paupers, persons affected with contagious diseases, and those imported for immoral purposes. It is the business of the consul of the port of departure to prevent, as far as it is possible, such persons from taking passage for the United States.

The quarantine laws and regulations call for much vigilance by consuls. They must see that vessels destined for the United States are free from contagious diseases and have a clean bill of health. They are also to report by cable or mail the prevalence in their districts of epidemics or plagues, the prevalence of diseases of cattle, and to see that in the shipment of hides and rags proper fumigating precautions are taken. For these purposes medical officers are detailed at the most important ports to act in coöperation with the consuls.

Besides reports as to the foregoing matters, consuls are required to send to the department a great number of reports, monthly, quarterly, annually, and at other times, on such a variety of subjects that reference must be made to the Consular Regulations for details. They are, however, mainly of a commercial character, as the first and chief duty of the consular service is to cultivate and develop American trade.

The visit of American naval vessels to foreign ports

occasions an exchange of social courtesies between their officials and the consuls. These are carefully indicated in the Regulations, and the consuls are there informed as to the calls to be made, the number of saluting guns they are entitled to, and other details. In times of civil disturbance naval vessels are sometimes sent to foreign ports at the request of consuls for the protection of American interests. In war times increased responsibilities are imposed upon them. This is especially so in case the United States is engaged in hostilities; but also in wars between foreign powers the consul must be on the alert to see that American commerce is not interfered with, and that the rules of neutrality are observed.

Consuls of the United States and of other powers residing in China, Siam, Korea, and, to a limited extent, in Turkey, Persia, the Barbary States, and in one or more other non-Christian countries, exercise certain judicial authority conferred upon them by treaty and regulated by the statutes of the United States. Until July 17, 1899, Japan was included in the list, but at that date by treaty stipulation with the Christian powers she was released from that régime. Under the system American citizens in those countries possess certain privileges under what is termed "exterritoriality." It is well stated in the British act conferring power to exercise it, as follows: —

"That it is and shall be lawful for Her Majesty to hold, exercise, and enjoy any power and jurisdiction which Her Majesty now hath or may at any time hereafter have within any country or place out of Her Ma-

jesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory." [1]

The national sovereignty and law are, by this and similar acts of other countries, transferred bodily onto a foreign soil and made applicable to citizens or subjects of the nationality dwelling there. Under this jurisdiction are regulated their rights as between themselves, and as between them and natives, and, with certain restrictions, between them and resident foreigners of other nationality. Secretary Frelinghuysen, in a communication to Congress, arguing for a continuance of the system and the enlargement of existing legislation, gave some reasons growing out of the peculiar laws and customs of non-Christian countries, as furnished by the American representatives in those countries. The minister to Turkey, in giving an account of the "sacred law" which controlled the administration of justice in that empire, reports: —

"In the category of the inadmissible witnesses, I find the following: Players of backgammon; though chess-players are admissible under certain conditions, such as that they do not spend all their time at the game, that they do not play for money, and that they fail not in their times of prayer on account of the game. So wine-drinkers and pork-eaters, because of the prohibition in the Koran; so of those who eat bread in the street; so of those who utter blasphemies against Mahomet and his disciples; so of those who make water standing, because in doing so the urine may spatter upon their

[1] For British act, see S. Misc. Doc. No. 89, 47th Cong., 1st Sess. 36.

legs, and they be made unclean, so that they cannot go into a mosque for prayers: so Jews may testify against Christians, and Christians against Jews, and foreigners against non-Mussulmans; but under this permission is couched the prohibition forbidding any of them testifying against a Mussulman. So the testimony of a woman counts for but half; that is to say, two women are required to make one witness."

Mr. Cushing, the first American minister to China, referring to the non-Christian countries, wrote: "As between them and us, there is no community of ideas, no common law of nations, no interchange of good offices;" and he stated that it would not be safe to commit to them the lives and liberties of citizens of the United States. The consul-general at Shanghai, after a long official residence in China, reported that "there can be no doubt that the state of the Chinese judicial establishment, as it affects foreigners, is unsatisfactory. No code of procedure, worthy to be called such, exists." He also speaks of the prevailing corruption of the magistrates and other officers of the court.[1] For these and other reasons, the uniform testimony of foreign representatives has been that the exterritorial system should be retained.

The British government has provided a judicial system for the administration of justice in these countries, and in Egypt an international court is maintained, but such duties respecting Americans are discharged by the consuls, except in Egypt. For the reason that the consuls are absorbed with other cares and in most cases

[1] S. Misc. Doc. No. 89, 47th Cong., 1st Sess. 2.

they have had no legal or judicial experience, it has been urged upon Congress for some years past that a court should be organized, at least in the Far East, to administer justice, with authority to hold sessions in China, Korea, and Siam.[1]

Action on this subject was finally taken by the Fifty-Ninth Congress in respect to China, by the creation of a United States court for that country, presided over by a Federal judge, with a district attorney, clerk, and the other usual officers of such a court. By this act the consuls still have original jurisdiction in minor civil and criminal cases, with right of appeal to this court. Sessions of the court are to be held at Shanghai, Canton, Tientsin, and Hankow. In addition to jurisdiction in civil and criminal suits, the court has supervision of the estates of deceased Americans in China. An appeal lies to the United States Circuit Court in California.[2] The creation of this court will relieve the minister and consuls in China from a great burden of duties, and it is expected largely to promote the ends of justice.

The manner in which exterritoriality operates in China may be seen from an extract from a statement made by ex-Minister Denby, who for thirteen years exercised judicial authority on appeal from the consular courts. He says: "Under the various treaties made with these Asiatic powers by the Christian nations of the world, what is called 'extra-territoriality' prevails. This word

[1] For historical sketch on exterritoriality, Foster's American Diplomacy in the Orient, 89; S. Misc. Doc. 89, 47th Cong., 1st Sess.; for laws of United States, Rev. Stat. secs. 4083–4130.

[2] Act of Congress of June 30, 1906.

does not express accurately the condition to which it applies, but it has been universally adopted. It means that the foreigner in those eastern countries is governed by his own laws. If he commits a crime, he must be tried before his own consul, and if he is sued for debt, the action must be brought before his own consul. The Chinese courts have no jurisdiction to hear any action or proceeding against a subject or citizen of the treaty powers. It is readily to be seen that such a condition results in building up an *imperium in imperio* in every locality where foreigners have collected together.

"Take the British concession at Shanghai, for example. It is a magnificent city of five thousand foreigners, and two hundred and fifty thousand natives. It lies near the mouth of the Yang-tse, and it will be the actual terminus of almost every railroad in China. For shipping it is the fifth port in the world. Its people are simply 'squatters.' While their respective governments control them individually, municipally the people of Shanghai owe no allegiance to any country. All that was necessary was that the government of China and the representatives of the treaty powers should consent to granting a charter to Shanghai, and thenceforth absolute self-government prevailed. The consul-general of the United States administers the ordinances of this municipal council under the construction that they constitute the common law of the locality, he having, under the statutes of the United States, common law, admiralty, and statutory jurisdiction. The same condition of things prevails all over China as to the law affecting foreigners."

Consuls of the United States in the countries named have been empowered to arraign and try all citizens of the United States charged with offenses against law, committed in the country where the consul resides, and to sentence them to death, to imprisonment, or other penalties. The exercise of this judicial authority has been seriously called in question, but the Supreme Court has held that the government of the United States has power to make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein, and that the provision of the law for the trial there of felonies without indictment by a grand jury and trial by a petit jury are constitutional.[1] Consuls also have civil jurisdiction in all questions of controversy between citizens of the United States, whether of property or of person. They have exercised jurisdiction in divorce proceedings, but the department has expressed the opinion that their authority to solemnize marriage is not well established and that they should not perform the ceremony. As already stated, the judicial powers of consuls in China have been transferred in large measure to the new United States court.

The foregoing review of the duties of an American consul shows how numerous and onerous are the services required of him and what varied talents are called into play in discharging them. He is made by law the foreign guardian of our tariff system, of American shipping and sailors, the protector of American citizens abroad; he becomes a material factor in enforcing our immigration laws and excluding undesirable additions to our popu-

[1] 140 U. S. Supreme Court Reports, 453.

lation, he has important duties to discharge in respect of our quarantine regulations, and to his vigilance is in large measure due exemption from pestilence and disease, and he is called upon to make frequent and exhaustive reports upon a wide scope of subjects. And to all these is added, in Oriental countries, large judicial and semi-diplomatic functions.

Secretary Frelinghuysen, in a report to Congress on the consular service, referring especially to the varied duties where exterritorial privileges prevail, cited the duties of the consul-general at Shanghai, China, as follows: "1st. He has supervisory control over all consulates in China. 2d. Because of the distance from the legation at Peking, the insufficient means of communication, especially in winter, and the peculiar powers of the local government, he has often important duties to perform, requiring delicacy and tact. 3d. With the other consular representatives he participates in the municipal government of the foreign settlement with a very considerable population, and containing much valuable property, both real and personal. 4th. He is a judge trying civil causes in which Americans are defendants, and trying them for crime sometimes carrying the extreme penalty of the law. He also has charge of the jail in which American prisoners are confined. In his judicial capacity he is judge of a criminal court, of a court of probate and divorce, of an equity and of a nisi prius court. 5th. He is United States postmaster, handling all the mails arriving at Shanghai for citizens of this country, either officials or private individuals. 6th. He performs the duties of a seaport consulate, viz.:

has care of American shipping, guarding the interests of master, crew, and owners; he protects the revenue of his government and watches and strives to increase the export trade." [1]

I need add nothing further to make it apparent that the post of consul of the United States is one of large responsibilities, demanding varied talent, great intelligence, and unwearied attention. Prince Talleyrand, speaking at a time when the scope of a consul's duties was much more contracted than at present, and referring to a French official who had previously held the post of minister at two European courts and had accepted the post of French consul-general at Milan, said: "After having been a skillful minister, how many things one has to know besides to be a good consul; for the duties of a consul are infinitely varied. They are of a kind very different from those of other agents of foreign affairs; they demand a mass of practical knowledge for which a special education is necessary."

From the fact that a consul is not a diplomatic officer, it follows that he is not entitled to many of the immunities which are conceded to the latter under international law and usage. He, however, enjoys certain privileges because of his representative character. But as these have not been universally recognized, and the practice and legislation of different countries vary, many of these privileges have been specifically secured by consul conventions or stipulations in commercial treaties. For instance, the United States has treaties with various countries whereby consuls are reciprocally

[1] H. R. Ex. Doc. 146, 48th Cong., 1st Sess.

exempt from arrest except for crimes; from the obligation to appear as a witness in court (but in most cases provision is made that the deposition may be taken in the consulate); and from taxation, unless the consul engages in business or owns real estate in the country. Exemption is also secured by treaties from military service or billeting, and the inviolability of the archives and papers of the consulate are guaranteed; but these privileges would be generally conceded at the present day in the absence of a treaty stipulation; as also would the right to display the national arms and flag, although the latter is forbidden by some countries. While the foregoing privileges to consuls are conceded by most countries either under international comity or treaty, Great Britain is a notable exception. That government, while claiming the most favored nation treatment for its consuls in foreign lands, extends to foreign consuls in Great Britain no other privileges than those granted to a private individual. Its position on the subject is that consuls are not entitled to immunities in the absence of treaties, and that the government has no power to exempt them from British jurisdiction without a special act of Parliament, and no such act has thus far been passed.

By virtue of the right of exterritoriality consuls in Oriental countries enjoy most of the immunities of diplomatic representatives. Much the same rule as to the right of asylum is applied to consulates as to legations. In the United States the rule of reciprocity of treatment is observed as to taxation and the exemption of official supplies from customs duties. Consuls are entitled to unrestricted communication with their own government

in time of war, but it is a breach of privilege to allow the consular bag to be used by the hostile authorities or people. The suspected infringement of this privilege by foreign consuls residing in the Southern States during our Civil War was the occasion of much complaint. A privilege guaranteed to foreign consuls by the Federal Constitution is that suits against them must be prosecuted in the Federal, not State, courts.

The government of the United States has not failed to recognize the privileges of resident foreign consuls, and a number of instances may be cited where reparation has been made for infringement of their rights by local authorities.

A consul of the United States is under the same interdiction as stated respecting a diplomatic representative, from corresponding with the press or discussing in public addresses the political affairs of the country to which he is accredited or of his own.

The consular service of the United States has been the subject of much criticism, and various attempts have been made to secure Congressional action for its reform. Successive Presidents and secretaries of state have from time to time urged legislation for the improvement of the service, in an increase of salaries, in the requirements for admission, and in the tenure of office; and the commercial bodies throughout the country, with great unanimity, have called for such reform, but thus far with little success. The act of the Fifty-ninth Congress, adding to the service five inspectors of consulates, has already been cited. The bill as originally introduced provided for the most of those improve-

ments; but they were all stricken out, with the exception of the increase of salaries. As the offices are still subject to the "spoils system," the chief effect of the increase of salaries will be to add to the number and voracity of the partisan office-seekers.

The three essential features which should be adopted to make the reform effective are: First, the exemption of the appointments from political influence; second, the permanence of the service; third, a system of promotion. While Congress is apparently unwilling to bring about these reforms by legislation, because of its attachment to "the spoils system," it is entirely within the power of the executive department of the government to put in operation all three of these measures. No president has yet had the courage to discard political influence in the appointments, but efforts have been made to secure a better fitted class of consuls by subjecting appointees to an examination, and in adopting a system of promotion.

In 1895 President Cleveland proclaimed a series of rules,[1] prescribing a method of filling vacancies by promotion and by subjecting persons appointed to an examination before being commissioned. Much of the effectiveness of these rules was diminished by the fact that their promulgation had been preceded by an almost entire change in the personnel of the consular service on purely partisan grounds. It is stated that the year following the enforcement of those rules, of thirteen candidates for consular appointment, eight passed the examination and five were rejected.

A new administration came into power in 1897, and

[1] 9 Presidents' Messages, 624, 639.

the "clean sweep" of the Cleveland régime was followed by that of President McKinley. Out of a total of 272 salaried consuls, 238 were changed. The rules of the preceding administration, slightly modified, were nominally continued, and it is stated that out of 112 candidates for appointment the year following, only one failed to pass the examination.[1] Such a record for two succeeding administrations of different parties does not strongly commend this method of reform by executive action.

The rules promulgated by Presidents Cleveland and McKinley have been strengthened, upon the recommendation of Secretary Root, by a recent order of President Roosevelt regulating the admissions to and promotions in the consular service, in which it is designed to supply the omissions of Congress in the late consular act. This executive order prescribes that all vacancies in the office of consul-general and of consul, except in the two lower classes, shall be filled by promotion from the lower grades; that vacancies in the two lower classes shall be filled either (a) by promotion of consuls, consular clerks, vice or deputy consuls, or consular agents; or (b) by new appointments of candidates who have passed a satisfactory examination; that the subjects for examination shall include at least one modern language other than English; and that neither in the designation for examination or appointment will the political affiliations of the candidate be considered.[2]

This method, if it could be made permament, would

[1] For facts above stated, see vol. 35 Century Magazine (1898–99), 604.

[2] Executive Order, June 27, 1906.

effect a long-desired reform in the consular service; but it has the defects of not making the examinations competitive and of having been put in operation after the consulates had been filled, in large measure, by the partisans of the administration; and there is no assurance that the order will be executed in its true spirit by a succeeding administration, especially if it should be of an opposing party. Executive orders are subject to executive repeal. The only hope for real reform is by removing the appointments from political influence. Not until the executive orders shall be put into the form of legislation by Congress, in response to a strong popular demand, will real and permanent reform in the consular service of the United States be attained.

CHAPTER XII

NEGOTIATION AND FRAMING OF TREATIES

The negotiation of treaties is the highest function which a diplomatic representative is called upon to discharge, and the one which requires the greatest skill and circumspection on his part. Treaties cover a great variety of subjects. The peculiar relations of royal prerogative, consanguinity, and marriage of the European monarchies give rise to a class of treaties with which the United States has nothing to do, but, with this exception, an enumeration of the character of conventions which this country has celebrated with various nations will indicate the scope of subjects covered by international compacts, which, it will be seen, embrace more than a score in number.

The most important and numerous of these are treaties of (1) amity, commerce, and navigation, and under these may be embraced the special treaties as to (2) consuls, (3) free navigation of rivers, (4) trade-marks, (5) fisheries, (6) shipping, and (7) commercial reciprocity. Treaties of (8) peace may be next mentioned, of which, in its existence of one hundred and thirty years, the United States has been called upon to make four. There has been only one treaty of (9) alliance, that with France, and it was terminated more than a century ago. Then follow treaties for the (10) cession of

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territory, (11) extradition, (12) naturalization, (13) arbitration, (14) settlement of claims, (15) immigration, (16) boundaries, and (17) ship-canals. To these are to be added a number, the like of which with the march of time are no longer required, as those for the (18) suppression of the slave trade, (19) abolition of sound and strait dues, (20) of droit d'aubaine. The foregoing are the classes of treaties entered into between the United States and individual nations, but there are others in which many nations join, such as the (21) Postal Union, (22) for the protection of industrial property, as patents and the like, (23) submarine cables, (24) observance of rules of war, (25) for the creation of the Hague Arbitration Tribunal, (26) for the establishment of an international bureau of weights and measures, and various others of like character. In addition to these there are still other international compacts effected, as we shall see later, by means of reciprocal legislation for the protection of copyrights, commercial and shipping privileges, and other matters.

As indicating the broad scope of this branch of international law and comity, it may be stated that the treaties of the United States with other nations now in force exceed three hundred in number, and it is estimated that those in force between the various nations of the earth is not less than eight thousand. Verily the international code of the world constitutes a ponderous compilation.

In addition to the treaties themselves there are various documents connected with or having relation to them which it may be well to notice in this connection.

Capitulations relate especially to immunities or privileges granted to Christians resident in the Turkish empire; they are unilateral engagements which, in the process of time, have been made applicable to the citizens and subjects of all foreign powers, under "the most favored nation" claim, and now have the validity of treaties. The same term was applied to the conventions for the enlistment of Swiss guards taken into the service of European powers. A *concordat* is a treaty or agreement between Catholic powers and the Holy See, and regulates the relations between church and state.

Preliminaries of peace are articles or stipulations agreed upon between nations at war to regulate their relations, pending a definite settlement of their disputes. They generally result in an armistice or cessation of hostilities. The provisional agreement of 1782 between the American colonies and Great Britain became the permanent treaty of peace, because of the comprehensive scope of its provisions and of the failure of the negotiators to adjust any other of the matters in dispute. The protocol agreed upon between Secretary of State Day and Ambassador Cambon, on August 12, 1898, for an armistice in the Spanish war, was of this character. In it certain points were agreed upon to control the negotiators of the permanent treaty of peace. A *declaration of war* in former times was often a formal document, in which the head of the nation entering upon an armed conflict set forth the reasons which led to his act. The practice has in great measure fallen into disuse, and in many recent instances no formal declaration of war was made; but there are certain declarations or pro-

clamations which are usually required, such as notice of blockade, etc. A declaration of war sometimes assumes the form of a *manifesto*, but the latter is more often applied to the signed declarations of a sovereign or diplomatic representative setting forth the motives for any particular act or line of policy. To this class belongs the Ostend Manifesto of Ministers Buchanan, Mason, and Soulé, published in 1854, already noticed, setting forth the policy of the United States toward Cuba. A *cartel* is an agreement between belligerents as to the conditions of war, and of late it has been exclusively applied to arrangements for the exchange of prisoners. An *ultimatum* is the final decision of one of the parties to a negotiation or dispute, and must be accepted or rejected as it stands.

A *proposal* is a document or offer submitted to a diplomatic representative respecting matters outside of his instructions or powers, and which he receives *ad referendum*. He may express no opinion upon it in transmitting it to his government, or, if it meets with his individual approval, he receives it *sub spe rati* — in hope of ratification by the home government. A *protocol* is an official statement of the proceedings of conferences between plenipotentiaries, or a document by which a fact is described in detail, and which is signed by the parties on each side. A *note verbal* is an unsigned paper explaining details, giving a résumé of conversations or of events, or indicating possible proposals. A *memorandum* or *memoire* has much the same character, giving a summary of the state of a question or a justification of a decision adopted.

We come now to consider the parties to the negotiation of a treaty. These parties are usually the secretary of state or minister of foreign affairs and the resident ambassador or minister of the country concerned. Of late years it has been the general policy of the United States to negotiate its treaties through the secretary of state, as he usually has a wider comprehension of the effects of treaty stipulations, and is in a better position to understand the sentiments of the country; but to this rule many exceptions exist. There are notable instances in our history where special envoys have been sent to a foreign court to negotiate, even though our country was represented there by able diplomats. Several such cases have already been cited, such as that of the mission of Chief Justice Jay to London, and Mr. Monroe to Paris respecting the Louisiana cession. Similar action has been taken by the British government, as in sending Lord Ashburton to Washington in 1842 as a special plenipotentiary to negotiate with Secretary Webster the treaty on the northeastern boundary, and Lord Elgin, in 1854, to bring about and sign the Canadian reciprocity treaty. We have also seen that it has been the practice of our government to send abroad commissions of prominent statesmen to negotiate treaties in times of emergency, such as the making of peace.

A representative to negotiate a treaty must be clothed with what are termed "full powers." Although an ambassador is supposed to represent the person of his sovereign and is sent abroad with credentials which are termed "extraordinary and plenipotentiary," he does not ordinarily make a treaty without special "full

powers" for the particular negotiation he has in hand; and the same disability rests upon the secretary of state or minister of foreign affairs, who must have special credentials for each treaty negotiated. John Jay when he went to London in 1794, bore with him four "full powers" or credentials, covering all the subjects intrusted to him. These precautions indicate the great care and precision exacted by governments in treaty negotiations.

Where representatives are sent to a conference or commissioners are sent to meet like commissioners, they are not provided with credentials to the head of the State, but are given full powers, which are exhibited at the first assembling and are passed under critical scrutiny. During the Chinese-Japanese war of 1894–95 the Chinese government, with the assent of Japan, sent commissioners to the latter country to negotiate for peace. The conference for negotiations was formally opened by the exhibition of the credentials of the commissioners of each government. At the second meeting, the following day, the Chinese commissioners were informed that their credential letters did not contain full power to conclude and sign a treaty, that no further conferences would be held with them, and that they must return to China. It became necessary to send out a new Chinese commissioner, in the person of Li Hung Chang, occasioning two months' delay and further military disasters to China.

A short time before the Anglo-American joint high commission of 1898 convened, Newfoundland was admitted to the negotiations after the American commis-

sioners had received their credentials. When the conferences were opened by the exchange of the full powers it was found that those of the Americans did not mention Newfoundland. New credential letters had to be obtained from Washington, but this did not delay the negotiations.

Negotiators are possessed of the views and wishes of their government by personal interviews with the head of the State and the chief of the foreign office, and, in addition, are usually furnished written instructions; but they are in most cases personally conversant with the questions at issue. Besides, in this day of quick communication, they readily learn the views of their government on any new phase as it arises. During the negotiations of the American and Spanish peace commissioners at Paris in 1898, the American commissioners were in direct communication by cable with the President and secretary of state. Upon the adjournment of each day's session, where circumstances required it, a report was telegraphed to Washington, and the President was thus enabled to send further instructions at every step of the negotiations.[1]

Governments in the past have been known to supply their negotiators with two sets of instructions — the one to show their opposing colleagues, if need occurred, and the other for their confidential guidance; but the practice is believed to be falling into desuetude. The protocol under which the Anglo-American joint high commission was constituted contained a provision that the instructions given by the respective governments to their com-

[1] For correspondence, S. Doc. 148, 56 Cong., 2d Sess.

missioners should be exchanged by the two governments before the meeting of the commission. This unusual provision was due mainly to the fact that the protocol named eleven different subjects for the consideration of the commission, and it was felt that such a course would facilitate the deliberations.

The observations already made in regard to the use of language in diplomatic correspondence applies to treaties, to wit: that two centuries and more ago the language of treaties was the Latin, that afterwards the French was in universal use, but that at present almost all governments use their own language. In the early years of our history many of our treaties were in French only; this was the case as late as 1824, in respect of our treaty with Russia, and our treaty of 1830 with Turkey.

A treaty has as many counterparts as there are contracting parties. Our treaties with Great Britain have only one version. With nations using different languages the text in both appears in parallel columns on the same page or on opposite confronting pages.[1] If three or more nations unite in a treaty, the text usually is in French. The utmost care is observed in writing the counterparts, the phraseology in the two languages is made as nearly identical as possible, and conformity

[1] The first treaty of the United States with a government of the Far East was that with Siam of 1833. The preamble, speaking of the treaty, says: "One original is written in Siamese, the other in English; but as the Siamese are ignorant of English, and the Americans of Siamese, a Portuguese and a Chinese translation are annexed, to serve as a testimony to the contents of the treaty. The writing is of the same tenor and date in all the languages aforesaid."

of punctuation is sought. In treaties where a large number of nations join, the copies for signature are sometimes printed. In every foreign office the duty of preparing and examining the counterparts of treaties is assigned to a particular bureau, and in some foreign offices a bureau is maintained for this special service.

The practice of the *alternat* in treaties is now observed by all nations, that is, the right of each chief of state to have his name and the name of his plenipotentiary appear first in the preamble, and the name of his nation first in the body of the treaty in the counterpart which he retains. In former times the more powerful or more ancient nations claimed the right to be first named in treaties, and not until the nineteenth century was it abandoned. France first recognized with the United States the *alternat* in its treaty of 1803 (the Louisiana purchase). Great Britain refused to concede it in the treaty of peace of 1814 and in anterior conventions, but upon the insistence of our government yielded it in the treaty of 1815 and thenceforward. It was first conceded by Spain in the treaty of 1819. The Spanish negotiator, in consenting, intimated that on signing he might deliver a protocol against its use being made a precedent for the future, whereupon the secretary of state, the stout John Quincy Adams, informed him that the United States would never make a treaty with Spain without it.

The *preamble* to a treaty contains the names or titles of the nations celebrating it and the names and titles of the negotiators who sign it. With European and Oriental nations these titles are often of great length and

set forth in much detail. The better and prevailing practice in the United States is to omit all titles, except where the negotiator is the secretary of state. The preamble should also state in general terms the subject matter of the convention. It also often contains the motives or intentions of the contracting parties, and this has in many instances given occasion for the use of very florid and peculiar language.

It was formerly the universal practice to introduce the preamble with a solemn religious asseveration or divine invocation. The United States in this, as we have seen in other diplomatic matters, in its earlier history accepted and followed the existing practice. In the treaty of peace with Great Britain of 1783, which secured our independence, the preamble opens with these words: "In the name of the Most Holy and Undivided Trinity." It illustrates the inaptness of the use of such an invocation when it is stated that of the three American negotiators of that treaty, Adams, Franklin, and Jay, the latter was the only one who accepted the dogma of the Trinity. The same words appear in the British treaty of 1822. The treaties with Russia of 1824 and 1832 use the same invocation, as also that with Portugal of 1840. The treaty of peace with Mexico of 1848 begins: "In the name of Almighty God;" and these words are repeated in the treaty of 1853. That with Costa Rica of 1851 has: "In the name of the Most Holy Trinity," and similar language is employed in treaties with other Spanish-American countries. These relate to the compacts with Christian nations. The language of our conventions with some of the Moham-

medan states is more expressive and extravagant. That with Tunis (1797) has the following preamble: "God is infinite. Under the auspices of the greatest, the most powerful of all the Princes of the Ottoman nation who reigns upon the earth, our most glorious and most august Emperor, who commands the two lands and the two seas, Selim Kan, the victorious son of the Sultan Mustafa, whose realm may God prosper until the end of ages, the support of kings, the Seal of Justice, the Emperor of Emperors.

"The Most Illustrious and Most Magnificent Prince, Hamouda Pacha Bey, who commands the Ogdiak of Tunis, the abode of happiness, . . .; and the Most Distinguished and Honored President of the Congress of the United States of America, the most distinguished among those who profess the religion of the Messiah, of whom may the end be happy."

This language, however, appears tame beside that of some other similar Mohammedan documents. As an instance of these, I give extracts from the French capitulation of 1740, the provisions of which have been extended to the other Christian powers having relations with Turkey, and which has peculiar interest for the United States because it is still in force and appealed to by American ministers for the protection of their countrymen in Turkey. The preamble to this capitulation is quite lengthy, and I can only quote it in part, as follows: —

"The Emperor Sultan Mahmoud, son of the Sultan Moustapha, always victorious.

"This is what is ordered by this glorious and impe-

rial sign, conqueror of the world, this noble and sublime mark, the efficacy of which proceeds from the divine assistance.

"I, who by the excellence of the infinite favors of the Most High, and by the eminence of the miracles filled with benediction of the chief of the prophets (to whom be the most ample salutations, as well as to his family and his companions), am the Sultan of the glorious Sultans; the Emperor of the powerful Emperors; the distributor of crowns to the Chosroes who are seated upon thrones; the shade of God upon earth, the servitor of the two illustrious and noble towns of Mecca and Medina, august and sacred places, where all Mussulmans offer up their prayers; the protector and master of holy Jerusalem; the sovereign of the three great towns of Constantinople, Adrinople and Brusa, as also of Damascus, the odor of Paradise; of Tripoli in Syria; of Egypt, the rarity of the century, renowned for its delights; of all Arabia; of Africa; of Barca . . . [and eight other cities]; particularly of Bagdad, capital of the Caliphs; of Erzeroum the delicious . . . [and eleven other places]; of the isles of Morca, Candia, Cyprus, Chio, and Rhodes; of Barbary and Ethiopia; of the war fortresses of Algiers, Tripoli and Tunis; of the isles and shores of the White and the Black Sea; of the country of Natolia and the kingdoms of Roumelia; of all Kurdistan and Greece; of Turcomania, Tartary, Circassia, Cabarta and Georgia; of the noble tribes of Tartars, and of all the hordes which depend thereon; of Caffa and other surrounding districts; of all Bosnia and its dependencies; of the fortress of Belgrade, place

of war; of Servia and also of the fortresses or castles which are there; of the countries of Albania; of all Walachia and Moldavia, and of the forts and battlements which are in those provinces; possessor, finally, of a vast number of towns and fortresses, the names of which it is unnecessary to enumerate and boast of here; I, who am the Emperor, the asylum of Justice, and the King of Kings, the center of victory, the Sultan son of Sultans, the Emperor Mahmoud, son of Sultan Moustapha, son of Sultan Mohammed; I, who, by my power, origin of felicity, am ornamented with the title of Emperor of the two Earths, and, to fill up the glory of my Caliphat, am made illustrious by the title of Emperor of the two seas."

There ends the description and titles of the Turkish monarch. The document then turns westward and begins to designate the King of France, who is catalogued as follows: "The glory of the great princes of the faith of Jesus: the highest of the great and the magnificent of the religion of the Messiah; the Arbitrator and the Mediator of the affairs of Christian nations; clothed with the true marks of honor and of dignity; full of grandeur, of glory and of majesty; the Emperor of France and of the other vast kingdoms which belong thereto; our most magnificent, most honored, sincere and ancient friend, Louis XV, to whom may God accord all success and happiness, having sent to our august Court, which is the seat of the Caliphat, a letter containing evidences of the most perfect sincerity, and of the most particular affection, candor and straightforwardness; and the said letter being destined

to our Sublime Porte of felicity, which by the infinite goodness of the incontestably majestic Supreme Being is the asylum of the most magnificent Sultans and of the most respectable Emperors; the model of Christian Seigneurs, able, prudent, esteemed and honored minister, Louis, Marquis de Villeneuve, his counselor of State, and his ambassador to our Porte of felicity (may the end thereof be filled up with joy), has demanded the permission to present and hand in the aforesaid letter, which has been granted to him by our imperial consent, conformably to the ancient usage of our Court: and consequently the said ambassador, having been admitted before our imperial throne, surrounded with light and glory, he has given the aforesaid letter, and has been witness of our Majesty in participating in our power and imperial grace; and then the translation of its loving meaning has been presented, according to the ancient custom of the Ottomans, at the foot of our sublime throne, by the channel of the most honorable El Hadji Mehemmed Pacha, our first Minister; the absolute interpreter of our ordinances; the ornament of the world; the preserver of good order amongst peoples; the ordainer of the grades of our empire; the instrument of the glory of our crown; the road of the grace of royal majesty; the very virtuous Grand Vizier; very venerable and fortunate minister, lieutenant-general, whose power and prosperity may God cause to triumph and to endure."

Then begin the provisions of the treaty or capitulation, which goes on through eighty-five articles[1] and

[1] For historical sketch of Turkish Capitulations, see Van Dyck's

ends with these words: "On the part of our imperial majesty I engage myself, under our most sacred and most inviolable august oath, both for our sacred imperial person, and for our august successors, as well as for our imperial viziers, our honored pachas, and, generally, all our illustrious servitors, who have the honor and the felicity to be in our slavery, that nothing shall ever be permitted contrary to the present articles." [2]

As illustrative of a different style of Mohammedan documents, I give extracts from the preambles to the treaty of 1814, between the Shah of Persia and Great Britain, and between the Shah and France of 1855. It will be noted that while the compliments of the Turkish ruler are mainly moral and terrestrial, those of the Persian are astronomical and historical. That with Great Britain begins: "Praise be to God, the all-perfect and all-sufficient. These happy leaves are a nosegay plucked from the thornless garden of concord, and tied by the hand of the plenipotentiaries of the two great States in the form of a definite treaty, in which the articles of friendship and amity are blended." In another part of the treaty a firman is spoken of as being "equal to a decree of fate."

From that with France of 1855 I make the following extract: "In the name of the clement and merciful God. His High Majesty, the Emperor Napoleon [III], whose elevation is like that of the planet Saturn; to whom the sun serves as a standard; the luminous star of the

Report, S. Ex. Doc. 3, Special Session, 1881; for contents of French Capitulation of 1740, ib. p. 118.

[2] For copy of Capitulation of 1740, Recueil des Traités de la Porte Ottomane, etc. (France), ed. 1864, p. 186.

firmament of crowned heads; the sun of the heaven of royalty; the ornament of the diadem; the splendor of standards, imperial ensigns; the illustrious and liberal monarch. And His Majesty [the Persian Monarch] elevated like the planet Saturn; the sovereign to whom the sun serves as a standard; whose splendor and magnificence are like those of the heavens; the sublime sovereign; the monarch whose armies are as numerous as the stars; whose greatness recalls that of Djemschid; whose magnificence equals that of Darius, heir of the crown and throne of the Kayamans, the sublime and absolute Emperor of all Persia."

The treaty between the United States and Persia, made as late as 1856, has, in part, this preamble: "In the name of God, the clement and the merciful. The President of the United States of North America and His Majesty as exalted as the planet Saturn; the Sovereign to whom the sun serves as a standard; whose splendor and magnificence are equal to that of the skies; the Sublime Sovereign, the Monarch, whose armies are as numerous as the stars; whose greatness calls to mind that of Jemshid; whose magnificence equals that of Darius; the heir of the crown and throne of the Kayamans; the Sublime Emperor of all Persia; being both equally and sincerely desirous," etc.

The religious invocations found in the treaties of the United States and other Christian nations are a relic of very ancient superstitution or pious fear. In the earliest Greek inscriptions giving the text of treaties there appears an appeal to the Olympian Zeus. The earliest extant treaty of mediæval Europe contains the invoca-

tion, "By the name of God Almighty, by the Indivisible Trinity, by all Divine things, and by the dreadful day of the last Judgment." It was the common practice of Christian sovereigns of that period, in addition to their solemn promise to observe their treaties, to submit themselves, if violated, to all the punishments of the Church, "to excommunication, aggravation, reaggravation, interdict, anathematization, and other heavier censures and fulminations whatsoever." The treaty of Paris of 1856, closing the Crimean war, contains the pious formula, "In the name of Almighty God," but not since then has it been used in any document of similar importance; and about that date it disappeared from the treaties of the United States.

A treaty is said to be concluded or celebrated at the date of its signature, at which time it was formerly the practice of the sovereign of the court where it was negotiated to confer presents or decorations upon the foreign negotiators. Reference has been made to the constitutional inhibition in respect of this matter applicable to the envoys of the United States, and the practice of giving presents at the conclusion of treaties has greatly fallen into disuse even with monarchical governments. The practice, however, after being in great measure abandoned among Christian nations, was followed up to recent times in the intercourse with non-Christian countries. Mr. Roberts, the first American envoy sent to the East, was provided with a quantity of presents, which were bestowed upon the government officials of the countries with which he negotiated treaties. Commodore Perry carried with him to Japan a great variety

of valuable and curious gifts, and the exchange of them with the presents given in return by the Japanese was attended with much ceremony.[1]

After the treaty with Persia of 1866 was concluded, the preamble of which has just been quoted, the American minister to Turkey, who signed it, wrote the secretary of state as follows: "You are aware of the fact that the Ottoman and Persian Governments always expect to receive presents from the Christian powers with whom they negotiate treaties, when the ratifications of such treaties are exchanged. The treaty made with Turkey cost the United States some fifty thousand dollars. A much less sum would, in my opinion, suffice to satisfy the Persian officials. I learn that Spain, upon the exchange of ratifications of a treaty made by her with Persia, gave presents to the amount of twelve thousand dollars. I do not think that our Government should give less.

"I would suggest the following present: a diamond snuff-box of the value of four thousand dollars, for the Shah, and a few good specimens of improved American firearms, he being very fond of hunting; to Mirza Agbra Khan, the Grand Vizier, a diamond snuff-box to the value of three thousand dollars; Farrukh Khan, with whom the treaty was negotiated, another of the same value. To Mirza Ahmed Khan, the Persian chargé at Constantinople, a diamond snuff-box to the value of two thousand dollars. To Melkhom Khan, who was also engaged in the negotiation of the treaty and was instrumental in forming it, a present of the value of one

[1] Foster's American Diplomacy in the Orient, 50, 141, 163.

thousand dollars, besides backshishes to the different attachés of the Persian legation, who all expect them. A less amount than fifteen thousand dollars will not suffice."

It appears that the amount appropriated by Congress for this purpose was ten thousand dollars, and that it was duly expended for presents at the exchange of ratifications.[1] Again, in 1875, $10,800 were appropriated from the national treasury for presents to the Turkish officials upon the conclusion of the treaty of naturalization of 1874. The larger portion went to the Turkish minister of foreign affairs, who signed the treaty, and the other recipients were the son of the minister, the under-secretary, the counselor and dragoman of the ministry, the grand master of ceremonies of the court, and eight or ten other subordinate officials and servants. The expenditure, however, proved a poor investment for the United States, for after the treaty was ratified and proclaimed, the Turkish government declined to be bound by it, because of a misunderstanding as to one of its stipulations, the facts respecting which will be stated in the next chapter.

[1] Mr. Spence to Secretary of State, December 22, 1856; Mr. Morris to Secretary of State, February 25, 1862, MSS. Department of State.

CHAPTER XIII

RATIFICATION OF TREATIES

After a treaty has been negotiated and duly signed, it must be ratified by the governments respectively which are parties to it before it can have binding effect. The constitution or established practice of each country determines the method of ratification. In the United States it is the act of the President, "by and with the advice and consent" of the Senate, by a two thirds vote of that body, as provided by the Federal Constitution. In Great Britain it is said to be the sole prerogative of the sovereign, but we shall see that, before a treaty can have effect in the British Empire, in many cases the participation of the Parliament is necessary. In Germany, France, and most other constitutional countries a treaty requires the concurrence of the legislative bodies for its ratification; but certain kinds of treaties are excepted from this requirement.

Upon the receipt by the secretary of state of the counterpart of the treaty belonging to our government, the President sends this original counterpart to the Senate for its consideration and action, but it is within the power of the President, if he sees fit, to withhold a negotiated and signed treaty from the Senate. Precedents for this course are found, among others, in the action of President Jefferson withholding from the Senate

the treaty negotiated in London in 1806 by Messrs. Monroe and Pinkney, and the withholding of that of Mr. Hise with Nicaragua in 1849. So, also, the president has the power to withdraw a treaty from the Senate at any time before it is finally acted upon by that body, even though submitted by his predecessor. Instances of this kind are the withdrawal by President Cleveland in 1885 of the conventions sent in by President Arthur for a commercial reciprocity with Spain and for the construction of a Nicaraguan interoceanic canal, as well as the Hawaiian annexation treaty in 1893, sent to the Senate by President Harrison.

The framers of the Constitution of the United States followed the systems of government of the day in making the Federal Executive the medium of communication with foreign powers, but in one important particular they made a radical departure from the existing practice of nations. In joining the Senate with the Executive in the negotiation and confirmation of treaties, they introduced a popular factor into the relations of the new nation with the powers of the world, destined to work an important change in international affairs. And in requiring that all treaties should secure the vote of two thirds of the Senate, the framers of the Constitution emphasized their conviction that the Executive should enter into no stipulations with a foreign power which did not command the support of a large majority of the people of the United States.

It is an interesting fact that when the occasion arose for the first time to put in operation the clause of the Constitution that the President " shall have power,

by and with the advice and consent of the Senate, to make treaties," Washington, who had been the President of the Constitutional Convention, sent a message to the Senate informing that body that on the next day at an hour named he would go in person to the Senate Chamber "to advise with them [the Senate] on the terms of the treaty to be negotiated." [1]

Previous to this notification the Senate had appointed a committee "to confer with him on the mode of communication between the President and the Senate respecting treaties and nominations." [2] It seemed to be taken for granted that the Constitution contemplated oral communication or personal conference between them as to treaties when their ratification was under consideration. In reply to the inquiry of the committee, the President wrote: "In all matters respecting treaties, oral communications seem indispensably necessary, because in these a variety of matters are contained, all of which not only require consideration, but some may undergo much discussion, to do which by written communications would be tedious without being satisfactory." [3]

It was also considered proper that the President

[1] 1 Annals of Congress, 67. The message is as follows: —

NEW YORK, AUGUST 24, 1789.

Gentlemen of the Senate: The President of the United States will meet the Senate in the Senate Chamber at half past eleven o'clock to-morrow to advise with them on the terms of the treaty to be negotiated with the Southern Indians.

GO. WASHINGTON.

1 Messages of the Presidents, 61.

[2] 11 Washington's Writings, 417; 1 Annals of Congress, 66.

[3] 11 Washington's Writings, 417.

should call the Senate to meet him at his residence for the consideration of treaties, but that, until the government should provide a public building for the President, it would be more convenient for him to go to the Senate.[1] Although in the entire existence of the government there has occurred only this one participation of the President in the executive sessions of the Senate, there is still found in the Standing Rules of the Senate a provision which contemplates such visits, and also that the President shall convene the Senate at such place as he may appoint.[2]

In accordance with the notification above cited President Washington went to the Senate to consider the treaty which was to be negotiated, accompanied by the secretary having it in charge, and the subject was considered jointly for two days; but this method was found to be subject to serious objections and quite unsatisfactory, and it was abandoned after this one experience. A senator, who was present and took part in the session, has recorded that it was found after the President had presented the subject that the Senate was not prepared to act upon it without further consideration and an adjournment was taken until another day. He adds that the President withdrew with a "discontented air," and says: "Had it been any other than the man who I wish

[1] 11 Washington's Writings, 417–419.

[2] The following is the Rule (Rule XXXVI): "When the President of the United States shall meet the Senate in the Senate Chamber for the consideration of Executive business, he shall have a seat on the right of the Presiding Officer. When the Senate shall be convened by the President of the United States at any other place, the Presiding Officer of the Senate and the Senators shall attend at the place appointed, with the necessary officers of the Senate."

to regard as the first character in the world, I would have said, with sullen dignity."[1] The report of the President's displeasure at his conference with the Senate was confirmed years afterwards by President Monroe.[2] The practice which has ever since that event been followed is for the President to transmit to the Senate the treaty, accompanied by a message containing such statement as may be considered proper respecting the negotiations and such documents as would be useful to the Senate in its deliberations, and to answer the calls of the Senate or its committee on foreign relations for further information.

The first treaty that was ratified under the Constitution was one which had been negotiated during the Confederation while John Jay was secretary of foreign affairs, who continued to act in that capacity for some months after the new government was organized. When the treaty came to be considered by the Senate it was ordered "that the Secretary of Foreign Affairs attend the Senate to-morrow, and bring with him such

[1] Maclay's Journal: Sketches and Debates in the First Senate of the United States (1890), 128 ff.

[2] President Washington's visit to the Senate on this occasion was recalled at a cabinet meeting during the administration of Monroe as narrated in his diary by John Quincy Adams, then secretary of state, as follows: —

"Mr. Crawford told twice over the story of President Washington's having at an early period of his administration gone to the Senate with a project of a treaty to be negotiated, and been present at their deliberations upon it. They debated it and proposed alterations so that when Washington left the Senate Chamber he said he would be d——d if he ever went there again. And ever since that time treaties have been negotiated by the Executive before submitting them to the consideration of the Senate.

"The President said he had come into the Senate about 18 months after the first organization of the present government, and then heard that something like this had occurred." — 6 Memoirs of J. Q. Adams, 427.

papers as are requisite to give full information relative to the consular convention between France and the United States." On the next day the following entry was made in the journal: —

"The Senate was to-day mostly engaged in Executive business. The Secretary of Foreign Affairs attended, agreeable to order, and made the necessary explanations."[1] In this action the secretary was following a practice observed in the Continental Congress, but the new secretary of state, Mr. Jefferson, profiting by the President's experience, discontinued it.

Although the President and secretary of state ceased to go in person to the Senate to deliberate with it upon treaties, this body has been recognized in a variety of ways by them as a coördinate part of the treaty-making power, both before negotiations have been entered upon and during their progress, as well as at their close, and this continuously throughout the entire existence of the government.

The instances were frequent during the administration of President Washington. Among the cases where the advice of the Senate was asked before negotiations were entered upon, a number may be cited between 1790 and 1792, respecting proposed treaties with Indian tribes, and in all such instances the Senate took action.[2] Several instances of the same kind occurred during this period respecting treaties with foreign governments. When a question arose with Great Britain regarding the northeastern boundary in 1790, negotiations were sus-

[1] 1 Annals of Congress, 52.

[2] 1 Presidents' Messages, 76, 79, 116, 122.

pended until the President could secure the advice of the Senate as to the propositions which should be submitted by the government.[1] On May 8, 1792, the President submitted to the Senate the question whether, if he should conclude a treaty with Algiers on the terms stated, the Senate would approve it.[2] The Senate agreed to approve the treaty on the terms specified by it.[3] Before sending in his message the President had been advised by Secretary Jefferson that since the subsequent approbation of the Senate was necessary to validate a treaty, it should, if the case admitted, be consulted before opening negotiations.[4]

While, as will be seen, in various other ways the Presidents continued to consult the Senate as to treaty negotiations, the above practice of asking in advance its advice respecting the terms of treaties to be proposed was not resorted to for a considerable period. But there is a notable instance of the return to the practice during the administration of President Polk, when, in his message of June 10, 1846, he sent to the Senate a draft of a proposed convention with Great Britain for the settlement of the Oregon boundary. In the message[5] he said:

"In the early periods of the Government the opinion and advice of the Senate were often taken in advance upon important questions of our foreign policy. General Washington repeatedly consulted the Senate and asked

[1] 1 Annals of Congress, 980.

[2] 1 Presidents' Messages, 123.

[3] 1 Executive Journal, 36, 37.

[4] 21 MSS. Washington Papers, 91; Jefferson Papers, series 4, vol. 2, No. 18.

[5] 4 Presidents' Messages, 449, 452.

their previous advice upon pending negotiations with foreign powers, and the Senate in every instance responded to his call by giving their advice, to which he always conformed his action. This practice, though rarely resorted to in later times, was, in my judgment, eminently wise, and may on occasions of great importance be properly revived. . . . Should the Senate, by the constitutional majority required for the ratification of treaties, advise the acceptance of this proposition, or advise it with such modifications as they may upon full deliberation deem proper, I shall conform my action to their advice."

The same President informed the Senate, August 4, 1846, that, in view of "the glorious events which have already signalized our arms," he had determined "to extend the olive branch to Mexico." He then laid before the Senate the basis of the proposed negotiations for peace, and asked the Senate, if in executive session it concurred in his views, to initiate an appropriation to carry out the negotiations.[1]

President Buchanan, February 21, 1861, submitted an inquiry to the Senate as to whether or not it would approve a treaty respecting a boundary question which had arisen with Great Britain, and named three points to be covered by the proposed treaty.[2] The Senate referred the matter, March 16, to President Lincoln, who renewed the request of his predecessor and said he would "receive the advice of the Senate thereon cheerfully."[3] A few months later he sent to the Senate a draft of a treaty to be proposed to Mexico, and asked

[1] 4 Presidents' Messages, 456. [2] Ib. 666. [3] 5 Ib. 12.

its advice thereon. The Senate not acting promptly, President Lincoln, in view of the importance of the question, again solicited its advice. The Senate then passed a resolution that the treaty was not advisable, but before that decision was communicated to the American minister in Mexico, he had signed two treaties on the subject. Thereupon the President sent the treaties to the Senate, but, referring to its previous action, said, "the action of the Senate is of course conclusive against an acceptance of the treaties on my part." [1]

Other instances of a similar character are the action of President Johnson in 1868, in consulting the Senate as to the expediency of negotiating an extradition treaty with Great Britain; of President Grant, in 1872, in submitting a proposed article to overcome the obstacle which had arisen to the progress of the Geneva arbitration tribunal, and in 1874 of a draft of a proposed treaty for Canadian reciprocity. In his message as to the Geneva tribunal President Grant said, "the Senate is aware that the consultation with that body in advance of entering upon agreements with foreign states has many precedents." President Arthur, in 1884, sent to the Senate a proposal from the King of Hawaii for the extension of the reciprocity treaty, and said, "I deem it fitting to consult the Senate in the matter before directing the negotiations to proceed." [2] Other later cases might be cited.

[1] 6 Presidents' Messages, 60, 63, 81.

[2] Ib. 696; 7 ib. 166, 266; 8 ib. 218. Compilation of Reports of Senate Com. on For. Rel., S. Doc. 231, 56th Cong., 2d Sess. pt. 8, 22.

Presidents have often resorted to another method of consulting the Senate in advance of opening negotiations with foreign powers, to wit: in sending to that body the nomination of special envoys, stating the purpose of their nomination, and giving in some cases the basis of the proposed negotiations. The confirmation of the nominations under such circumstances has been understood to be an approval of the proposed negotiations.

In 1792 President Washington sent to the Senate a report from the secretary of state to the effect that the Spanish government had indicated a disposition to open negotiations for the adjustment of the difficulties respecting the navigation of the Mississippi River, stating his views as to what it was desired to accomplish, and recommending that special plenipotentiaries be appointed to open negotiations at Madrid; and this was accompanied by the nomination of two plenipotentiaries for that purpose. After confirmation and the arrival of the plenipotentiaries at Madrid it was ascertained that the Spanish government desired to extend the negotiations to commercial matters, and, upon the advice of Secretary Jefferson that a resubmission of the matter to the Senate was necessary, the President sent a further message communicating the basis of a commercial treaty as proposed, and asked the Senate to consent to the extension of the powers of the American commissioners, which was done.[1]

A similar course was adopted when Mr. Jay was

[1] 1 Presidents' Messages, 114; 5 Jefferson's Writings, 442; 1 American State Papers, 133.

nominated as special envoy to Great Britain in 1794 to adjust the acute difficulties with that country.[1] In 1797 three commissioners were nominated to open negotiations with France to save the two countries from a threatened war, and the objects to be attained were set forth in the message. Two years later a nomination of a minister to France was submitted to the Senate, with a statement of the conditions under which he was to enter on his mission. The Senate hesitated to confirm the nomination, and the President substituted the nomination of three commissioners, the purpose of their mission was set forth, and the conditions under which they would take their departure.[2]

The Russian government having indicated in 1797 a desire to negotiate a commercial treaty, President Adams informed the Senate of the fact, and asked it to confirm the nomination of Mr. King, minister in London, as a special envoy for that purpose. When Messrs. Livingston and Monroe were nominated as special plenipotentiaries to negotiate for the acquisition of the island of New Orleans, in 1803, President Jefferson advised the Senate of the purposes of the mission.[3] A case of special interest was that set forth in President Van Buren's message to the Senate, in 1838, which illustrates the care with which the prerogatives of that body were respected by the Executive. It was informed that the republic of Ecuador had signified its desire to enter into a treaty of commerce, that the newly appointed minister to Peru, about to repair to his post,

[1] 1 Presidents' Messages, 153.

[2] Ib. 245, 282, 284.

[3] Ib. 282, 350.

could stop en route and attend to these negotiations, and that the expenses incurred could be paid out of the foreign-intercourse fund. He adds: "Desiring in this and in all instances to act with the most cautious respect to the claims of other branches of the government, I bring this subject to the notice of the Senate that if it shall be deemed proper to raise any question it may be discussed and decided before and not after the power shall be exercised."[1]

In addition to submitting to the Senate the advisability of opening negotiations, the President has sought its advice on doubtful questions of treaty interpretation or action. In 1791 the French government claimed that certain acts of Congress were in contravention of the existing treaty between the two countries. President Washington submitted the matter to the Senate, with a full report from Secretary Jefferson and the correspondence, and solicited its opinion, as he said, "that I may be enabled to give it [France] such answer as may best comport with the justice and interests of the United States." The Senate, after due consideration, gave its advice that the position of the government of the United States was correct and should be maintained.[2] In 1817 the secretary of state and the British minister entered into an arrangement, by an exchange of notes, for disarmament on the Great Lakes. One year afterwards President Monroe sent the correspondence to the Senate and asked whether this was a matter which the Executive was competent to settle alone, and, if not,

[1] 3 Presidents' Messages, 477.

[2] 1 Ib. 89; 1 Annals of Congress, 1771.

then he asked for its advice and consent to making the agreement. The Senate took cognizance of it, and advised its ratification, which was observed with the formalities of a treaty.[1]

The question of the northeastern boundary having been submitted to the arbitration of the King of the Netherlands, and his award being rendered, the President transmitted a copy of the award to the Senate and asked "whether you will advise submission to the opinion . . . and consent to its execution." The Senate advised against its acceptance.[2] Similar action was taken by President Buchanan, in 1861, respecting the Paraguayan award and was repeated by his successor in 1862.[3] Upon receipt of a dispatch from the minister in Hawaii urging measures to bring about its annexation to the United States, President Grant, in 1871, communicated the dispatch to the Senate, stating that any recommendation it should see fit to make would be very acceptable.[4]

The President has also suggested to the Senate in a number of instances that the treaties negotiated by his representatives and sent to it for approval, be amended by that body in particulars indicated by him. In one case where he recommended that an article be stricken out, the Senate approved the treaty without making the amendment, and thereupon the President declined to ratify the same. In sending the Clayton-Bulwer treaty to the Senate, President Taylor referred to the Nica-

[1] 2 Presidents' Messages, 36.

[2] Ib. 559 ; Moore's International Arbitrations, 138.

[3] 6 Presidents' Messages, 67.

[4] 7 Ib. 131.

ragua treaty then pending in that body, and asked if both were to be approved that the Senate amend them both in the particulars in which they were in conflict.[1]

In rare instances the Senate has initiated treaties by requesting the President to open negotiations with foreign governments on specially indicated subjects.[2] More frequently such action has been by joint resolution of the two houses of Congress.[3] Such action, however, is usually discouraged. The Senate committee on foreign relations, reporting adversely on a resolution of this character, in 1816, said: "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiations may be urged with the greatest prospect of success. . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch. A division of opinions between members of the Senate in debate on propositions to advise the Executive, or between the Senate and Executive, could not fail to give the nation with whom we might be disposed to treat the most decided advantage."[4]

[1] 3 Presidents' Messages, 259; 4 ib. 600; 5 ib. 42, 154, 229; 6 ib. 152.

[2] 3 Ib. 272; 8 ib. 609.

[3] 22 U. S. Statutes at Large, 1053; Public Statutes, 1901-02, 481; 1 Moore's International Arbitrations, 962.

[4] Compilation of Reports of Senate, etc., vol. 8, 22. For review of treaty-making power, see article by Senator H. C. Lodge in Scribner's Magazine, January, 1902; also Treaties, their Making and Enforcement, by S. C. Crandall (1904).

The question to what extent, if any, the Senate can interpose during the negotiation of a treaty by the Executive, has been recently the subject of animated debate in that body. On the one hand it is contended that the President has the exclusive right to conduct a negotiation up to the point of the signature of the treaty and submitting it to the Senate, when the duty of that body respecting it begins. On the other hand, it is maintained that it is proper for the Senate, at any time during the negotiation and before the treaty is signed, to communicate its views to the President regarding the negotiation.[1]

The Senate has exercised its constitutional power of amending treaties after they have been signed and submitted to it for approval in a large number of cases. In most instances this action has been accepted by the Executive and by the interested foreign powers. Since the organization of the government more than seventy of such amended treaties have gone into operation. Although the Senate has so often exercised its prerogative in amending treaties, the official records show that those negotiated by the Executive and ratified without change by the Senate are far in excess of those amended or rejected.

While the negotiation of treaties is conducted by or under the direction of the secretary of state, such negotiation cannot properly be said to be concluded until the "advice of the Senate" is obtained, which, as noted, is sometimes secured in advance, but usually not until the

[1] See speeches of Senators Spooner and Bacon, Congressional Record, vol. 40, No. 47, February 12, 1906.

treaty is submitted to the Senate for ratification. That body being made by the Constitution a part of the treaty-making power, the amendments which it may see proper to submit for the consideration of the foreign government which is a party to the proposed treaty are as much a stage of the negotiations as the preceding action of the secretary of state.

The Senate has not infrequently exercised its constitutional right in the rejection of treaties, some of them of the highest importance, as that for the annexation of Texas and San Domingo, the fisheries convention with Great Britain, and the arbitration treaty of 1897. Other conventions have remained unacted upon for years and been finally ratified, and still others have been allowed to expire in the committee or in the Senate.

The action of the body is often delayed beyond the time fixed for exchange of ratifications, and in many instances protocols or conventions have been agreed upon extending the time, but these protocols are always submitted to the Senate for approval. This delay is not considered a good ground for complaint, as the Senate being a coördinate branch of the treaty-making power has the right to take such time as it may think necessary for deliberation and action. When, however, the Spanish government delayed the ratification of the convention for the cession of Florida for two years, Secretary J. Q. Adams protested in most vigorous language.

It is also held by our government that the failure of the Senate to ratify is no cause for complaint, even when the treaty has already been ratified by the other party. It is true that an American plenipotentiary is

clothed by the President with "full powers" to negotiate and sign the treaty, and the latter promises to ratify his action, but these are always understood to be qualified by the constitutional provision as to ratification, and the treaties generally contain a clause that they shall be ratified "by and with the advice and consent of the Senate." This matter was discussed early in Washington's administration. When in 1792 the instructions to the American commissioners to Spain were being considered in the cabinet, Mr. Hamilton maintained that the proposed treaty should contain a reservation as to ratification, so as to indicate the participation of the Senate. Secretary Jefferson considered that it was sufficient to stipulate that it would be ratified, without stating by what agency.[1] The treaty of 1795 with Spain, accordingly, contained the provision that it should be "ratified by the contracting parties." But the Jay treaty of 1794 with Great Britain had the phrase "by and with the advice and consent of the Senate;" and, as stated, the latter has been the course usually followed.

Vattel expresses the generally accepted view that a refusal to ratify should be based upon "strong and valid reasons." The obligation to ratify is stronger in the case of sovereigns who both give the "full powers" and possess the prerogative in their own persons of ratification; but even these have freely exercised the right of rejection. For instance, the King of Holland refused to ratify a treaty in 1841 because after it was signed he

[1] 5 Jefferson's Writings, 445; Treaties and Conventions of the United States, Spain.

had become convinced that it would injure the trade of his subjects; and the British government declined to ratify a treaty with Portugal in 1883, alleging that its provisions were very far from satisfying the traders and others immediately concerned. One of the strongest reasons for the formality of ratification is thus apparent, that a state may not be exposed to serious injury from the inadvertence or mistakes of the negotiator or by a change of conditions.

After a treaty has been approved by the Senate the President has the power of declining to ratify, and has exercised that power by allowing the treaty to fail by non-action. This usually occurs because of amendments made. In one instance, at least, the President sent the Senate a message giving the reasons for his action.[1]

Treaties are considered in executive session, but in one case (the fisheries treaty of 1888) it was debated and acted upon in open Senate. Often the treaties are made public before action by the Senate, even though considered in executive session, and sometimes after action the injunction of secrecy is removed as to the discussion. Under this practice Senator Sumner's celebrated speeches on the cession of Alaska in 1867 and the National Claims against Great Britain in 1869 were published.

Instances have occurred where the Senate, after acting upon treaties and transmitting them to the President, has by resolution requested their return, and has taken the same into consideration and reversed its previous action.[2]

[1] 4 Presidents' Messages, 600.

[2] Senate Executive Journal, vol. 9, 312; ib. vol. 10, 144; ib. vol. 12,

After the Senate has approved a treaty, its action is communicated to the President, whereupon an instrument of ratification is prefixed to the treaty, signed by the President, attested by the secretary of state, and the Great Seal is attached. The next step is the exchange of ratifications, which is done by plenipotentiaries, nominated with "full powers," but not necessarily those who negotiated the compact.

The time within which this act is to be done is usually fixed in the last paragraph of the treaty. The custom of fixing a time within which ratifications are to be exchanged grows out of the fact that it is the duty of the contracting governments to preserve as far as possible the *status quo* in respect to the matters which are the subject of the treaty. As will be seen later, it is sometimes the practice for the governments to enter into a temporary arrangement, termed a *modus vivendi*, for this purpose, pending the negotiation and ratification of a treaty.

The formality of exchange of ratifications is for the American plenipotentiary to hand a copy of the treaty previously prepared, which has the signatures of the President and secretary of state and the Great Seal attesting its ratification, to the plenipotentiary of the other contracting state, and receiving from him a like copy which has the signature of the head of his state; so that each government has in its archives its own counterpart with its own ratification, and a copy of the treaty with the ratification of the head of the other government.

423, 461; ib. vol. 27, 470; ib. vol. 11, 165, 218; ib. vol. 11, 222, 254, 276; ib. vol. 19, 281, 291; ib. vol. 11, 147, 153; ib. vol. 24, 287, 455.

A protocol setting forth the act of exchange of ratifications is drawn up and signed by the plenipotentiaries.

The place for exchange of ratification of treaties is stipulated in the concluding paragraph, and is usually the capital of one of the contracting governments. It was agreed in the Russo-Japanese peace treaty of 1905 that the exchange should take place in Washington, the treaty having been signed in this country, and diplomatic representatives having been withdrawn from the respective capitals of the belligerents at the opening of hostilities.

Even after ratification a treaty may fail because of refusal to exchange ratifications. At least two instances of this class have occurred in the history of the United States. The archives of the government contain about eighty treaties which, after being signed, have failed to go into effect for various reasons.

In addition to the foregoing method of entering upon treaties, nations may become parties thereto by what is termed adhesion or accession. Thus, where several nations have united in treaty stipulations which may have a general application to other countries as well as to the nations which originally join in them, the other countries may become parties thereto by a formal act to that effect, in the manner set forth in the convention. For instance, the Great Powers of Europe, in the conference held after the Crimean War, adopted what are known as the Four Rules of Paris, governing their future action as between each other in time of war; and they provided that all the other commercial nations should be invited to accept them, and this has been

done by most of the maritime countries of the world. The United States has not given its formal adhesion to these Rules, although it observes them; but it has acceded to the Geneva Convention of 1864 known as the Red Cross Convention, although not an original party to it; and likewise to the convention for the protection of industrial property; in both of which almost all the commercial nations have joined. Such conventions have to follow the usual course of being submitted to the Senate for its advice and consent, and the accession of the United States being made in the terms stated in the instrument, and the same proclaimed by the President.

The last step in the completion of a treaty is its official publication. This is accomplished in the United States by the formal proclamation of the President, attested by the secretary of state; and a similar act is done in most countries. In Great Britain, however, it is not proclaimed by the sovereign, but appears in the *Official Gazette* and is laid before Parliament.

The foregoing review of the method and form of treaty-making shows that while the Executive as a rule initiates and conducts the negotiation and execution of treaties, the functions of the Senate constitute an influential element in this important branch of public affairs. Severe criticism is passed upon the Senate, sometimes at home, but more often abroad, for its action respecting treaties. It is frequently charged that it is composed of members who are ignorant of international law and of diplomatic practice, and that its decisions are mainly influenced by partisan politics and by a desire to thwart

the Executive. At no time in our history has the committee on foreign relations of that body been without controlling members thoroughly conversant with international law and foreign affairs; and, though not without blemish, the personnel of that body may be favorably compared in intelligence and decorum with any other legislative body of European governments. Its members are on most questions swayed by partisan considerations, but in international affairs they are generally actuated by a high spirit of patriotism, and the conduct of the Senate respecting treaties has, in the main, justified the wisdom of giving it participation in the treaty-making power. Justice Story, after half a century of experience of the Constitution, wrote: "It is difficult to perceive how the treaty-making power could have been better deposited, with a view to its safety and efficiency."[1]

[1] 2 Story on the Constitution, Cooley, 1873, 355.

CHAPTER XIV

INTERPRETATION OF TREATIES

The signing of treaties or the exchange of ratifications is sometimes accompanied by protocols signed by the representatives of the two contracting parties, or by declarations on the part of one of the representatives, designed to interpret or affect in some way the terms of the treaties. It is a well-settled principle of the government of the United States that no such document can have any effect whatever upon a treaty to which it is a party, unless the document has been submitted to the Senate and received its approval in the same manner as is required for the treaty itself.

The citation of a few cases will illustrate this practice. When the treaty of 1824 between the United States and Russia was about to be exchanged, the Russian minister informed Secretary Adams that he was instructed by his government to file an explanatory note at the time of the exchange of ratifications, stating the views of his government as to the meaning and effect of certain articles of the treaty. Secretary Adams informed him that such a note could have no effect whatever upon the treaty unless it was sent to the Senate with the treaty and received its approval, intimating that such a course might imperil the treaty. He advised the minister not to make it a part of his act of exchange

of ratifications; but to file it at some date after that event. It would then be received as the interpretation placed upon the treaty by his government. The minister pursued this course. This explanatory note, while it did not modify the treaty, was in later years brought into prominence by Secretary Blaine's discussion with Lord Salisbury in the Bering Sea controversy, and was used to support the contention of the United States.[1]

After the ratification of the treaty of peace of 1848 with Mexico, two American commissioners were sent to that country to exchange the ratifications. Anticipating difficulty in securing the action of the Mexican government, they were given authority to make certain verbal explanations as to the meaning and purpose of the amendments which the Senate had made to the treaty; but on their arrival they found it necessary, in order to secure the exchange, to put their explanations in the form of a protocol signed by them and the Mexican minister of foreign relations. The instrument was held to have no effect upon the treaty, but it placed the government in a bad light with the Mexicans and its conduct was severely criticised at home.[2]

In proceeding to the exchange of the Clayton–Bulwer treaty of 1850 relative to the Isthmus Canal, Sir Henry Bulwer filed with Secretary Clayton a declaration respecting Honduras. The secretary stated that as, in his judgment, the declaration was in conformity with

[1] Fur Seal Arbitration: Proceedings of the Tribunal of Arbitration at Paris, 1893, U. S. Government publication, 1895, vol. 2, Appendix, 276.

[2] Foster's American Diplomacy, 320, and documents there cited.

the treaty, he did not think it necessary to send it to the Senate or to delay the exchange of ratifications. In the long diplomatic controversy which followed, and which was only terminated by the Hay-Pauncefote treaty of 1901, this declaration played a prominent part; but it was generally held in the United States that it had no effect on the treaty.[1]

When the King of Spain came to ratify the treaty of 1819 by which Florida was ceded to the United States he attached thereto a declaration respecting certain grants of land. After this ratification the treaty was again submitted to the Senate and the declaration approved as a part of the treaty.[2]

The naturalization treaty of 1874 with Turkey had various vicissitudes because of the declarations attending the exchange of ratifications. The treaty when submitted to the Senate was approved with an amendment. In exchanging the ratifications at Constantinople the Turkish government accompanied that act with a memorandum giving its interpretation to the treaty, and this was accepted by the American minister who participated in the exchange. When reported to the secretary of state, he disavowed the act of the American minister, held the exchange of ratifications to be invalid in view of the construction placed on the amended treaty by the Turkish memorandum, and the treaty was not proclaimed. Several years elapsed in which efforts were made to secure the acceptance by the

[1] 2 Wharton's Digest, 190, 192 ; Life of Lewis Cass, Smith, 756.

[2] 2 Wharton's Digest, 281 ; Treaties and Conventions of the United States, Spain.

Turkish government of the treaty in the spirit contemplated by the Senate amendment. In 1889 the American minister reported that the Turkish government was willing to accept the treaty without any qualifying construction, but as fourteen years had elapsed since the action of the Senate, it was deemed advisable to secure its approval before proclaiming the treaty. The Senate advised the exchange of ratifications with the understanding that it should not be retroactive in its effects. Whereupon the Turkish government asked for a construction of that proviso, which was given by the secretary of state in 1891. To this construction that government again desired some qualification and further correspondence ensued. In 1896 the secretary of state offered to send the treaty to the Senate for the third time to obtain its advice on the new phase of the matter, should the Turkish government so desire, and it was left in the hands of the American minister in Constantinople to reach an agreement. But owing to the tergiversation characteristic of that government, no settlement has as yet been reached and the treaty has not been put in operation.[1]

The Senate of the United States gave its consent to the ratification of the treaty of peace with Spain on February 6, 1899. On the 14th of the same month it passed a resolution that the ratification of the treaty was not intended as an incorporation of the inhabitants of the Philippine Islands into citizenship of the United States. The Supreme Court held that this resolution had no effect in modifying the text of the treaty, as it

[1] U. S. For. Rel. 1896, 929–937.

had not received the assent of the President or of Spain.[1]

The general principle of international law is that, unless expressly stipulated to the contrary, a treaty is retroactive in its effects, and is binding from the date of its signature; but the United States Supreme Court has held that so far as concerns individual rights or parties interested, it does not operate until after exchange of ratifications.[2] Treaties are designated or named by the date of their signature. The treaty with Spain, signed in 1819, was not proclaimed till 1821, but is always referred to as the treaty of 1819.

A treaty is made by the Constitution the supreme law of the land, and operates as such in all matters not requiring legislative action. But when dependent on, or imperfect without, legislative action it does not take effect until such action is had. A treaty may, therefore, be in force as to some of its provisions and suspended as to others until Congress shall legislate. In order to remove all doubt, it is customary in commercial treaties which change the existing revenue laws to insert a clause that they are not to go into effect until the necessary legislation is enacted by Congress. The Hawaiian reciprocity treaty contained the provision that "the present convention shall take effect as soon as it . . . shall have been ratified and duly proclaimed on the part of the government of the United States, but not until a law to carry it into operation shall have been passed by the Congress of the United States of America." A similar provision was inserted in the Canadian reciprocity

[1] 183 U. S. Rep. 176. [2] 6 Peters' Rep. 691; 9 Wall. 32.

convention of 1854, and in that with Mexico of 1883. Although the latter was duly ratified by the Senate and proclaimed by the President, Congress failed to pass the law necessary to carry it into effect within the time fixed by the convention. The period for that purpose was twice extended by protocols approved by the Senate, but Congress still failing to pass the necessary legislation, the treaty lapsed. The Cuban reciprocity treaty of 1903 as negotiated contained no such provision, but the Senate amended it by inserting one.[1]

As already noted, the sovereign in Great Britain possesses the power of ratification of treaties, but they are always laid before Parliament after ratification; and if they contain provisions which constitute a charge upon the people or alter the law of the land, as to these they are inoperative until Parliament legislates. On this question Mr. Dallas writes:

"The commercial convention recently entered into with France, contains an express declaration that it shall not be valid unless 'Her Britannic Majesty shall be authorized by the assent of her Parliament to execute the engagements contracted by her in its several articles.' Such a clause is, I am assured, always introduced in modern treaties of this kind; and upon the present occasion its exigency was met by the adoption of a joint address to the Queen approving comprehensively the diplomatic programme.

"I believe it safe to say, now-a-days, that a treaty which calls for a law in order to be executed may be constitutionally nullified by the refusal of either House,

[1] Treaties in Force, 1904, Cuba.

the Commons or the Lords, to enact that law. If it be necessary to assent, it is competent to dissent. Treaties requiring appropriations of money; treaties establishing tariffs, or mutual terms of interchanging products; and treaties relinquishing territorial dominions, perhaps, sink into the power of Parliament."[1]

A treaty has the legal effect of repealing all federal laws in conflict with it, and it likewise overrides all state constitutions and laws. The term "supreme law" in the Constitution, applied to treaties, gives them no higher standing or greater force, however, than an act of Congress; both are upon the same footing, and the latest enactment controls. Mr. Jay in "The Federalist" expressed the opinion that a treaty could not be repealed by the act of Congress alone, but that being a contract its repeal could be brought about only by the joint action of the high contracting parties; but, as we shall see, the Supreme Court has held that it can at least be made nugatory by a law of Congress.[2]

In case the provisions of a treaty are in conflict with the Constitution the latter prevails, and the treaty cannot be enforced in the courts. The treaty of 1853, between the United States and France, contained a provision that consuls "shall never be compelled to appear as witnesses before the courts." M. Dillon, the French consul at San Francisco, was summoned as a witness in a criminal case pending in the United States District Court, and he pleaded this stipulation of the treaty; but the court held that it could have no force or effect,

[1] 2 Dallas' Letters from London, 353.

[2] The Federalist (Lodge), 405.

because it was in conflict with Amendment VI of the Constitution of the United States that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, etc." The French government complained that the action of the court was a violation of the treaty. The secretary of state successfully maintained that the stipulation cited was of no force, "because the Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other. It is not within the competence of either Congress or the treaty-making power to modify or restrict the operation of any provision of the Constitution of the United States." The treaty of 1853 is still in operation; but the clause cited is not observed in the United States.[1]

A treaty is a contract between two free parties, but when it is sought to apply to it the principles of municipal law and to execute it as a legal obligation, the defect of international law, as a code to be enforced, at once becomes apparent. The essential element of a sovereign state is its independence, and independence is inconsistent with legal obligation. There is no court with power to enforce international law and bring a recusant nation to the bar of justice to answer a charge of violation of a contract. It is commonly said that a country observes the stipulations of a treaty no longer than it suits its interests or its convenience to observe them; but this has never been universally true in modern

[1] *In re* Dillon, 7 Sawyer's Reports, 561; 1 Wharton's Digest, 665; Treaties in Force, 1904, France.

times, and I am happy to believe it is less true to-day than ever before. The elevated principles of international law are a great restraint upon the conduct of nations, and this is shown in a marked degree by their action respecting treaty obligations. While it is not possible to apply to these instruments all the principles of municipal law respecting contracts, many of them are recognized and respected.

I give some of the accepted rules which determine the validity of a treaty, and refer the reader to the text-books for fuller details. The agents must not only be authorized to negotiate, but, as we have seen, the treaty must be duly ratified in the form required in each country. In the United States it must be such as the President and the Senate have the power under the Constitution to make. The contracting party must be a sovereign and independent state. Neither the Kingdom of Hungary, nor the Governor-General of India, for example, can make a valid treaty; nor can a dethroned monarch nor a revolted and unrecognized province. It must be possible of execution. Material errors may vitiate it. Uncertainty as to facts may make it difficult of execution. The treaty of peace of 1783 named the St. Croix River as part of the boundary between the United States and the British possessions, but owing to the imperfect geographical knowledge of the period it became impossible to locate such river. It is an interesting fact in this connection that, in an effort to ascertain the intent of the negotiators, the commission to whom the subject was submitted took the deposition of John Adams and John Jay, two of the negotiators, and

admitted as evidence a letter of Benjamin Franklin, the other American negotiator. There are two Belgrades bearing the name mentioned in the treaty of Paris of 1856 without any clear intent to which one reference is made. The Canadians maintained that the Portland Canal laid down on the modern maps is not the body of water intended by that name in the Anglo-Russian treaty of 1825.

It has been insisted that a nation cannot be held by a treaty of alliance or guaranty to an immoral or an unjust war. Moral obligations are, however, difficult of determination. International contracts are usually supposed to be entered upon in the interest and according to the wishes of the people whose governments make them, but they are often directly the reverse. The case of Louisiana illustrates the indifference with which these interests and wishes are sometimes treated. By a secret treaty between France and Spain the inhabitants of that province were transferred to the latter power; by another secret treaty they were restored to France, one of the leading motives for which was a purely personal question relating to the royal families; and France, in violation of its faith with Spain and before having taken possession, sold the province to the United States; the action in each instance being taken without regard to the interests or wishes of the inhabitants concerned.

It is to the general advantage of nations that a treaty extorted by war shall be held to be binding. The plea of duress which would vitiate a contract under municipal law is not applicable to nations. At the same time, a treaty imposed by force of arms does not carry with it

such moral obligation for its observance as do those voluntarily entered into by governments consulting their mutual interests and convenience. The treaties made with Napoleon I were observed only so long as he had the military force to command their observance. France accepted the terms imposed by Germany in 1871, paid the enormous indemnity, and transferred Alsace and Lorraine; but few Frenchmen recognize any obligation to respect the treaty when it shall have become safe to repudiate it. While duress is not a sufficient plea for a nation, it is as to a negotiator. Santa Anna, President of Mexico, leading a military expedition against the Texans, was captured by the latter, and while a prisoner made a treaty of peace, but it had no validity for that reason.

Differences have arisen between nations occasioned by a variance in the text of treaties. Usually a government adheres to the text in its own language, but it is sometimes stipulated what text shall control in case of conflict of interpretation. In the treaty between the United States and China of 1903 it is provided that "in the event of there being any difference of meaning between them [the texts], the sense as expressed in the English text shall be held to be the correct one." A variance appearing in the treaty of 1819 with Spain, it was held by the United States Supreme Court that the Spanish version should be accepted, as being that of the party granting the concession.[1] It has also been held that a treaty with an Indian tribe must be interpreted not according to the technical meaning of its

[1] 3 Peters' U. S. Rep. 741.

words, as understood by lawyers, but in the sense in which it is naturally understood by the Indians.[1] A controversy has been carried on for years between the United States and Turkey as to the exterritorial rights of Americans in the Ottoman Empire, arising out of a variance in the texts of the treaty of 1830, and various efforts to reconcile the differences in the texts, as well as their interpretation, have failed; the subject having been at one time referred to the Senate for its views. It seems, however, to have been at last solved under the accepted principle of "the most favored nation" treatment, Turkey having granted to other nations the privileges contended for by the United States.[2]

The Supreme Court of the United States has had frequent occasion to interpret the provisions of treaties of the United States, and its high standing at home and abroad has given a special value to its decisions, which have contributed greatly to enlarge and establish the sounder principles of international law. A few of those decisions may be profitably cited in connection with the topic under consideration.

A provision in the treaty of 1795 with Spain for the protection of vessels in time of war by means of a passport, of which a copy of the form to be used was to be annexed to the treaty, was decided to be inoperative because the form was not annexed as stipulated.[3]

President Jefferson was of the opinion that the treaty for the cession of Louisiana was not authorized by the

[1] 175 U. S. Rep. 1.

[2] Treaties and Conventions of United States, Davis' Notes, Ottoman Empire; U. S. For. Rel. 1890, 914.

[3] 6 Wheaton's Rep. 1.

Constitution. Chief Justice Marshall, however, when the question came before the court, held that "the Constitution confers absolutely on the government of the Union powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."[1]

In a number of instances the court has sustained the provisions of treaties in relation to the inheritance and disposing by aliens of property, real and personal, in the states of the Union, regardless of state statutes to the contrary, even though it is admitted that respecting this Congress, in the absence of a treaty, would have no power to legislate.[2] In the last of those cases cited, Mr. Justice Field, delivering the opinion of the court, said: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself or of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

Mr. Calhoun, a strict constructionist of the Constitution, when secretary of state, wrote Mr. Wheaton as

[1] 1 Peters, 542.

[2] 2 Wheaton, 275; 10 Wheaton, 181; 100 U. S. Rep. 483.

follows: "The treaty-making power has been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other nations, and which can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers." [1]

[1] 2 Wharton's Digest, 67.

For an exhaustive treatise on this subject, see The Treaty-Making Power of the United States, by Charles Henry Butler, 1902. For a brief discussion, Treaties, their Making and Enforcement, by Samuel B. Crandall, 1904.

CHAPTER XV

TERMINATION OF TREATIES

Treaties may be terminated in various ways. They often come to an end by limitation or when the objects for which they were made are accomplished. Others contain a provision that they shall remain in force for a fixed period, and, thereafter, indefinitely until one of the parties gives notice of its desire to terminate them, which is styled a "denunciation." Treaties also come to an end when one of the contracting countries is annexed to or absorbed by another nation, as in the case of Texas and Hawaii, but this rule was not made applicable to the states which were united to form the German Empire in 1871. When the French occupied Madagascar in 1895 a question was raised by the United States as to the status of its treaty of 1881 with that island. The French government replied that the treaty was "inconsistent with the new order of things," but that it was its intention to extend to the island the conventions with the United States applicable to France and French possessions.[1]

Treaties usually expire when the confederation which made them is dissolved, and the several states reassume their independence, an instance of this kind being the Peru-Bolivia confederation of 1839; so, also, when the

[1] U. S. For. Rel. 1896, 117 ff.

internal composition of a state is so changed as to render the treaty inapplicable to the new order of things, as the various changes of the Netherlands, which rendered the treaty with the United States of 1782 inoperative. The United States has a large number of treaties which have expired for the reasons above stated.[1]

Some treaties may be partially in force and partially abrogated. The British treaty framed by the joint high commission of 1871 is of this character. It provided for four tribunals of arbitration, which soon concluded their labors; some of its provisions were without limit as to time, as the free navigation of certain rivers; some were for a fixed period and have been denounced; and as to others a difference of opinion exists as to whether or not they are in force.

Change of circumstances may modify or dissolve the obligation of treaties. It was quite common in former times to make treaties "perpetual and eternal," and many at the present day in their terms run without limit as to time; but no stipulation can be made so unalterable and binding that time and circumstances cannot terminate it. Francis I and Henry VIII concluded a "perpetual peace" in 1527 between France and England, and on the one part there were given as hostages two archbishops, eleven bishops, twenty-eight nobles, and thirteen towns; but even these did not prevent a fresh war in the same generation. The declaration of the conference of London of 1871, brought about by the action of Russia respecting the Black Sea, that "no power can liberate itself from the engagements of a

[1] Treaties and Conventions of U. S., Davis' Notes, 1232, etc.

treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers," is a principle of international law of qualified application in practice, and the nineteenth century presented many instances of its non-observance. It is not uncommon in the practice of nations for a government to suspend, to modify, to declare abrogated, or to disregard treaties because of changed conditions. Many instances might be cited of disregard of treaty stipulations during the past century by European nations because of changed conditions. One of the most notable was that by Napoleon III. He had entered into treaty stipulations by means of a concordat, which had thrown about it the religious solemnity and obligation of an engagement between His Holiness, the Pope, and a devoted Catholic sovereign. By this convention Napoleon guaranteed, by the presence of a French army in Rome, the maintenance of the temporal authority in the Papal States of Italy. But in a few years thereafter the Kingdom of Sardinia had, by war and the action of the people, become the Kingdom of Italy; Garibaldi had overthrown the King of the Sicilies; and Victor Emanuel had entered the Papal States. The French army withdrew from Rome, and the Pope lost all of his temporal possessions. Neither treaty stipulations nor his devotion to the Church could hold Napoleon to his engagement. Both he and the other governments of Europe recognized that the changed conditions had released him.

Other similar instances might be given, but I confine further citations to cases which have occurred in American history. The treaty of peace with Great Britain of

1783 provided that the Mississippi River should "forever remain free and open to the subjects of Great Britain," under the belief that it had its source or lay partly in British territory. Subsequent explorations revealed the misinformation of the negotiators, and after the acquisition of Louisiana the stipulation of 1783 ceased to be effective. By the treaty of alliance with France of 1778 the United States agreed to defend the French possessions in the West Indies and give French privateers certain privileges in its ports. After the French Revolution occurred, which overthrew Louis XVI, with whom the treaty had been made, the new government of France demanded that the United States should make good the stipulations of the treaty of 1778. The position taken by our government, advocated by Hamilton and opposed by Jefferson,[1] was that under the changed conditions the United States was released from the treaty, and President Washington accordingly issued his proclamation, in 1793, declaring neutrality in the war between France and the other European powers. The treaty was abrogated by an express act of Congress in 1798. France did not, however, recognize this act as a finality, and the treaty was mutually terminated by the convention of 1800.

In 1815 a commercial treaty was negotiated between the United States and Great Britain, by which various ports and places before closed to American vessels were opened to them, among which was the island of St. Helena. The treaty was duly ratified by the Senate,

[1] For Hamilton's views, 4 Works of Hamilton (Lodge), 74; for Jefferson's view, 6 Jefferson's Writings, 219.

but meanwhile the battle of Waterloo had been fought, Napoleon dethroned, and it was determined that he should be imprisoned at St. Helena. Thereupon, without asking the assent of the United States, the British minister gave notice that "in consequence of events which have happened in Europe subsequent to the signature of the convention," the island of St. Helena would be excluded from the effects of the treaty. Six years afterwards, upon the death of Napoleon, notice was given to the secretary of state by the British minister that the stipulations of the treaty regarding St. Helena would be effective. The reason for the suspension of the treaty clause was a substantial one, and the power to suspend was freely exercised by one of the parties to the contract without asking the consent of the other.

Another convention between the United States and Great Britain furnishes an illustration of how changed conditions may affect treaties. By the convention or arrangement of 1817 it was agreed that the naval armament of the two nations on the Great Lakes should be reduced to four vessels, none of which should exceed one hundred tons burden nor be armed with more than a single eighteen-pound cannon. But in 1837–38, during the Canadian rebellion, the British government largely increased its naval armament without asking the permission of the United States; and during our civil war the government of the United States did likewise. Each government has for many years past disregarded the provision as to the size of its vessels carrying cannon used in the revenue service, and the United States has for

years maintained on the upper lakes a naval vessel considerably larger in tonnage and armament than allowed by the treaty. The two governments tacitly recognize that the region in question has outgrown the conditions under which the convention was made. When it was negotiated wood was used in the construction of vessels, and sail was the propelling power. The conditions of navigation have been transformed. So, also, at that time almost no commerce existed, and a very sparse population inhabited the country bordering the Great Lakes. All this has changed. The convention of 1817 has become a dead letter as to the provisions cited, and this, too, without any express agreement between the parties to it.

The Clayton-Bulwer treaty of 1850 was negotiated, in part, to secure the construction of a particular interoceanic canal, by a private corporation and under plans then set on foot, but the project came to nought. Since the treaty was made, more than a half-century ago, a great transformation has occurred in the material and social conditions of this continent and in the political development and policy of the United States. From twenty-three millions of people it has grown to eighty millions, the population of the Pacific coast has increased a hundredfold, and the territorial possessions on the coast of this continent have more than doubled in area by the acquisition of Alaska. The Hawaiian and Philippine Islands with their millions of people have been acquired. Since the negotiation of the Clayton-Bulwer treaty the whole face of affairs in the Orient has changed. And from a limited continental power, with its population

mainly on the Atlantic coast, the United States has grown to a world-power, with greatly enlarged interests in the Pacific Ocean.

It was idle to contend that a nation which has undergone such marvelous development and transformation should be held to the terms of a treaty made a half-century ago to accomplish an enterprise then in life, but long since extinct. T. J. Lawrence, author of one of the latest works on international law and professor in Cambridge University, who combated Secretary Frelinghuysen's contention that Great Britian had violated the treaty in the creation of the Belize colony, has said that if the position were taken "that the United States have grown so great since the treaty of 1850 was signed, and their interests in the canal are so far superior to those of any other power, that they ought to have a preponderating voice in determining the rules to be adopted . . . such a position would have been impregnable." [1]

The committee on foreign relations of the Senate presented to the Fifty-first Congress a report containing a review of the history of the treaty of 1850, and it reported to the Senate its conclusion that it had become obsolete, and that "the United States is at present under no obligation, measured either by the terms of the convention, the principles of public law or good morals, to refrain from promoting in any way that it may deem best for its just interests the construction of this Canal, without regard to anything contained in the convention of 1850." To this report are appended

[1] Essays on Modern International Law, by T. J. Lawrence, 2d ed. 195.

the names of every member of the committee, and among them two who have held the office of secretary of state, Messrs. Evarts and Sherman.[1]

Influenced by the strong public sentiment of the country, Secretary Hay, in the treaty which he negotiated with the British ambassador in 1900 respecting the interoceanic canal sought to bring about the abrogation of the treaty of 1850. But when it was submitted to the Senate, that body, fearing that the purpose was not stated with sufficient distinctness, inserted an amendment stating in explicit terms that the treaty of 1850 was superseded by the new treaty. When this amendment was presented to the British government it agreed to the clause, and in the new convention which it became necessary to make, the Senate's amendment constituted the first article, and the obsolete treaty came to an end.[2]

The general rule of international law is that war terminates all treaties between belligerents, but this is subject to exceptions. The effect of war upon treaties was a source of labored and heated discussion at and following the peace negotiations of 1814 at Ghent. The contention of the American commissioners was that the treaties of 1783 and 1794 were only suspended during the war and that they revived with peace. Their position was that the treaty of independence of 1783 was in the nature of a partition between members of the British Empire and that its provisions were not of such a nature as to be included in the general rule applicable to treaties ter-

[1] S. Rep. 1944, p. 191, 51st Cong., 2d Sess.

[2] Treaties in Force, 1904, p. 381, Art. I.

minated by war. The British commissioners insisted that war put an end to them and that they could be revived only by an express agreement to that effect. They admitted that independence was an unalterable fact, and they agreed upon provisions for an adjustment of boundaries, but stubbornly refused to revive the fishery privileges recognized in the peace convention of 1783; and these were only partially secured by the later convention of 1818. Some treaties contain express provisions that certain of its stipulations shall remain in force during war, such as article 22 of the treaty of 1848 with Mexico which provides rules for the conduct of hostilities.

The Supreme Court has held that "treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the cause of war as well as of peace, do not cease on the occurrence of war, but are at most only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace." Such seems to be the position of English courts. The Master of the Rolls, referring to privileges given to holders of lands and their heirs or assigns, said, "it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent and not depend upon the continuance of a state of peace." [1]

In order to remove any doubts as to the status of preëxisting treaties, nations in their treaties of peace usually make an express declaration on the subject. The

[1] 8 Wheaton's U. S. Reports, 494; 10 Wheaton, 182; 1 Russel and Mylne, 663; Twiss' Rights and Duties in Time of Peace, 420.

treaty of peace of 1848 with Mexico specifically revived the treaty of amity and commerce of 1831. During the peace negotiations at Paris in 1898, the American commissioners proposed that all treaties in force before the war be held to continue in force. The Spanish commissioners were not prepared to consider that subject, and no provision was inserted in the peace convention. A new treaty of amity and commerce, however, negotiated in 1902, abrogated and annulled all treaties prior to 1898 except the claims treaty of 1834.[1] The conduct of Spain as to this treaty was highly honorable. By this convention it had obligated itself to pay perpetually to certain American claimants interest semi-annually on an award in their favor. Although at the outbreak of the war Spain had issued a decree that all agreements, compacts, and conventions were terminated by the war, in the year following it not only resumed the payment of interest but paid the installments which had fallen due while the hostilities were in progress.[2]

A treaty may be nullified by the indirect action of Congress through the enactment of legislation which conflicts with its provisions. The attorney-general and the Supreme Court have held that an act of Congress of later date than a treaty, although in violation of its terms, must be obeyed as municipal law within the country.[3] It does not, however, release the United States from its obligations to the other contracting state, and in no manner affords a sufficient excuse for the violation

[1] U. S. For. Rel., 1903, 730.

[2] Columbia Law Review, article by Prof. J. B. Moore, 213.

[3] 112 U. S. 580; 124 U. S. 190; 130 U. S. 580, 599; 149 U. S. 698, 721.

of a treaty. In upholding the Scott Chinese Exclusion Act of 1888 the Supreme Court stated that the remedy of China was in making diplomatic representations to the government of the United States or in resorting to such measures as, in its judgment, its interests and dignity demanded.

The Scott act of 1888 was a deliberate purpose to abrogate by indirect legislation the Chinese immigration treaty of 1880. Its impropriety was aggravated by the fact that it was passed while a treaty dealing with the subject was pending ratification. It was denounced in the Senate as an act of bad faith by such eminent senators as Evarts and Sherman. It was passed on the eve of a presidential election, and its excuse is to be found in the political exigencies of the campaign. The government later made amends for its conduct by the payment of the long-pending claims of Chinese laborers and by the negotiation of the treaty of 1894, which reconciled the differences between the two governments.[1]

In 1879 Congress passed a bill providing, among other things, for the abrogation of articles 5 and 6 of the treaty with China of 1868. President Hayes vetoed the bill, and, in doing so, said it was not competent for Congress to modify an existing treaty, as that could be done only by the treaty-making power under the Constitution. He added that "a denunciation of a part of a treaty, not made separable from the rest by the terms of the treaty itself, is a denunciation of the whole treaty."[2]

There is still another method by which it is possible

[1] U. S. For. Rel., 1890, China ; 130 U. S. Reports, 581 ; 185 ib. 220.

[2] 7 Presidents' Messages, 519.

to defeat or render ineffective treaties regularly entered into by the Executive and approved by the Senate. The question has been much discussed in and out of Congress how far treaties are binding upon the House of Representatives which is often called upon to legislate respecting them. It has been seen that a treaty when approved by the Senate and proclaimed by the President becomes by the Constitution the law of the land; but in many cases treaties contain provisions requiring the payment of money, sometimes they affect the revenue laws, and in other ways call for legislation by Congress to make effective certain of their stipulations. Is the House required in such cases to surrender the exercise of its judgment and freedom of legislation because of the action of the treaty-making power?

In no instance has the House of Representatives failed to pass the laws necessary to carry the treaties into effect, except in respect of the commercial reciprocity treaty with Mexico already cited, and that convention contained a clause reserving to Congress the question of the enactment of the required legislation. But a number of times the power of the treaty-making branch of the government to bind the House to enact specific legislation has been seriously doubted. The question first arose when the House was called upon to pass the measures necessary to put the Jay treaty of 1794 with Great Britain into operation, and it was then discussed at great length and with much feeling by the statesmen who had framed and put the federal Constitution into operation. It was again debated when the commercial treaty of 1815 with Great Britain was concluded. At

other times the question was raised in Congress, particularly when the House was called upon to vote the appropriation for the cession of Alaska as required by the treaty of 1867 with Russia.[1]

Another phase of the same question arose under the treaty of 1831 between the United States and France, which illustrates the embarrassment which might be caused by a refusal of the House of Representatives to pass the legislation necessary to carry a treaty into effect. That treaty called for a reduction of duties on French wines imported into the United States, and the payment by France of 25,000,000 francs as indemnity to American shipping during the Napoleonic wars. Congress promptly passed the law for the reduction of duties on French wines, but the French Chambers neglected to make the appropriation necessary to pay the indemnity, and three years after the treaty was signed absolutely refused to do so by a direct vote.

[1] As to action of House on Jay treaty, 1794, Annals of Congress, 4th Cong., 1st Sess. 464 (Gallatin's speech), 759, 760, 771, 772 (Madison's speech), 782, 1239 (Fisher Ames' speech), 1291 ; 1 Presidents' Messages, 194 ; 7 Hamilton's Works, 118; 8 ib. 386, 389 ; 6 ib. (J. C. Hamilton's ed.) 92 ; 7 Jefferson's Writings, 38, 40, 67 ; 8 ib. 266 ; 13 Washington's Writings, 181 ; 2 Madison's Works (ed. 1865), 69, 73, 75, 89, 94, 99 ; 1 Adams' Gallatin, 156. For decisions of courts as to treaties in force, 2 Peters' U. S. Rep. 313 ; 7 ib. 51, 89 ; 14 ib. 415 ; 124 U. S. Rep. 194. For action of House on commercial treaty with Great Britain of 1815, Annals of Congress, 14th Cong., 1816 ; 2 Wharton's Digest, 19, 20. For action on Alaska treaty of 1867, 6 Presidents' Messages, 524 ; House Journal, 40th Cong., 2d Sess. 1064 ; House Report 4177, 49th Cong., 2d Sess. ; Congressional Globe, 1867, 4031, 4059, 4092 ; 2 Wharton's Digest, 21, 22. For views of jurists, 1 Kent's Commentaries (Lacy's ed. 1889) 284, etc. ; Davis' Outlines of Constitutional Jurisp., Lecture 8 ; 1 Calhoun's Works (Cralle's ed.), 201, etc. ; Dr. E. Meier, Leipsic, quoted in 2 Wheaton, 24.

This led to the breaking off of diplomatic relations, but through the intervention of the British government the appropriation was finally made, the money was paid, and diplomatic relations were resumed.[1]

In organizing a new government unlike any of the systems of the past, and in shaping the new system by a carefully drawn written constitution, wherein the duties and functions of the three coördinate branches of government were sought to be precisely defined and marked out, it would not have been strange if the system had been found unworkable in some of its features. True, the Constitution has been put to severe tests, but it is a high testimony to the wisdom and patriotism of our formative statesmen that it has passed successfully through all its trials.

The division of powers respecting the conduct of the delicate matter of foreign relations was sought to be carefully marked out. In the next chapter we shall see that the line of demarkation between the Executive and the Senate is not so distinctly drawn as to settle all doubts. So also, as shown above, the powers and duties of the House of Representatives as to treaties are not so clearly set forth as to avoid heated controversy, but it is to the credit of the people's direct representatives to be able to say that in this respect they have never failed to maintain the good faith and honor of our country.

[1] 3 Presidents' Messages, 100, 188; S. Doc. 40, 23d Cong., 2d Sess.; S. Doc. 1, 24th Cong., 1st Sess.; S. Doc. 62, 24th Cong., 1st Sess.; House Ex. Doc. 111, 24th Cong., 1st Sess.; 3 Wharton's Digest, 88–96.

CHAPTER XVI

COMPACTS OTHER THAN TREATIES

THERE are various ways in which the government of the United States may enter into compacts or agreements of a binding character, other than by means of the formal treaties I have described. Most of these, however, are of a temporary character, and in large part they are based upon the legislative authorization of Congress or have received its approval.

A question which has been much discussed in recent years is how far the Senate of the United States can delegate to the Executive its functions as a part of the treaty-making power, and to what extent Congress can confer upon the President legislative duties. Repeated instances can be cited where legislation has conferred large powers upon the President in connection with our foreign relations, but it is contended that in none of those instances can it be said that Congress has transferred to him legislative powers, or that the Senate has parted from or delegated to the Executive its functions as a branch of the treaty-making power.

In the early days of the republic when many of the makers of the Constitution were participating in legislation, Congress passed laws giving to the President large powers respecting foreign commerce and tariff regulations. In 1794 he was empowered to "levy an embargo

whenever, in his opinion, the public safety shall so require . . . on all ships of the United States or of foreign nations in the ports of the United States;"[1] and in 1799 he was empowered to break off and renew commercial intercourse with France, "whenever, in his opinion, the interests of the United States shall require."[2] Many acts of a like nature have been passed by Congress, the Canadian retaliatory act of 1887[3] being still in force, which confers power upon the President, under contingencies specified, to suspend, in his discretion, all commercial intercourse with the Dominion.

By the act of June 8, 1872, the postmaster-general is vested with power to make postal conventions, with the approval of the President, and they are not required to be submitted to the Senate for ratification. The United States has more than forty such conventions. By similar authorizations of Congress binding agreements are made by the exchange of diplomatic notes as to trade-marks, copyrights, wrecking privileges, commercial reciprocity, and other matters.

Of this class of legislation Chief Justice Marshall said: "The difference between the departments undoubtedly is that the legislative makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the decision of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."[4] Of the same nature as the acts cited was the provision in the tariff act of

[1] 1 Statutes at Large, 373.
[2] Ib., 615.
[3] 24 St. at L., 475.
[4] 10 Wheaton, 46.

October 1, 1890,[1] known as the McKinley law, which gave the President power to impose certain specified duties upon articles named, admitted free under the law, whenever the President should be satisfied that any foreign nation was imposing duties on American products, which he should deem reciprocally unequal and unreasonable. Under that law the President, through the secretary of state, entered into negotiations with nearly a score of foreign governments, and made with several of them what are termed "reciprocity arrangements," which were duly proclaimed in the same manner as treaties;[2] and in the cases of other countries where the negotiations failed to bring about an agreement, proclamations were issued imposing duties on the articles named imported from those countries.[3] The life of these arrangements was dependent upon the maintenance of the law, and as the law of 1890 was repealed by that of 1894, they came to an end. Similar legislation was enacted in the revenue law of 1897.[4]

The act upon which these diplomatic agreements were based is probably the nearest approach to a delegation of legislative or treaty-making power, and its constitutionality has been upheld by the Supreme Court of the United States. The act was attacked on the ground that it "delegated to the President both legislative and treaty-making powers." In its decision the Court said: "That Congress cannot delegate legislative powers to the Pre-

[1] 26 Stat. at L. 612.

[2] For agreement with Spain for Cuba and Porto Rico, see 27 St. at L. 982.

[3] For Proclamation as to Venezuela, see 27 St. at L. 1013.

[4] U. S. Supl. II, 702; H. Doc. 15, 57th Cong., 1st Sess. pt. 3, 958 ff.

sident is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. What the President was required to do was simply in execution of the act of Congress."[1] A competent writer refers to this decision as "one in which the Supreme Court has come nearest to marking the boundary within which legislative power may be delegated."[2]

The inquiry has been made whether the Senate, in ratifying The Hague convention as to international arbitration, parted from its power or duty further to intervene in respect to cases of arbitration which may be submitted by the United States, in accordance with that convention; and whether the President alone, without the further action of the Senate, is empowered to decide all questions or issues which may be submitted to arbitration, and to carry the arbitration into full effect. The learned jurist who has propounded the inquiry says: "This is a tremendous power for a republic to lodge in one man's hands."[3]

The unratified general arbitration convention of 1897 with Great Britain contained no provision for a submission of such cases as would be embraced in the treaty to the Senate; whereupon that body amended the convention to require every case under it to receive its

[1] 143 U. S. Reports, 650.

[2] Hon. E. B. Whitney, in Columbia Law Review, January, 1901.

[3] Prof. S. E. Baldwin, in Yale Review, February, 1901.

approval. The various arbitration treaties negotiated with foreign powers in 1904 and 1905 contained a provision that in submitting each case to The Hague Court "a special agreement" should be made defining the matter in dispute, the powers of the arbitrators, and the procedure. A question was raised in the Senate as to the scope and meaning of the word "agreement," and to remove all doubt on the subject, it amended all the treaties by substituting in its place the word "treaty." The effect of this amendment would have been to require every case to be passed upon by the Senate before submission to arbitration.

The President has sent two cases to The Hague Court under the general arbitration convention of 1899 — the Pious Fund case under a protocol with Mexico in 1902 and the claims of American citizens against Venezuela under a protocol in 1903. Neither of these protocols was submitted to the Senate.[1] Both of them, however, were confined to private claims of American citizens against foreign governments.

There is a class of executive acts of a diplomatic character which at first glance would seem to be an independent exercise of the treaty-making power, but which in a strict sense cannot be so regarded. Of this class are agreements for the adjustment of claims of American citizens against foreign governments, which are often made by the secretary of state without any reference of the agreements to the Senate. The most noted of these was the agreement of 1871, made with

[1] U. S. For. Rel. 1902, 738–786, and Appendix 2; ib. 1903, 439–441.

Spain for the adjustment by arbitration of the claims of American citizens arising out of the Cuban insurrection. The agreement, made by a simple exchange of notes, is included in the official volume of treaties,[1] but it was never submitted to the Senate for approval. Under this agreement claims to the amount of several millions of dollars were adjusted.

A number of other agreements of a similar character have been made by successive secretaries of state, whereby specified claims of Americans have been submitted to arbitration. The practice has not been uniform with regard to sending them to the Senate. Sometimes such adjustments have taken the form of conventions which were submitted to the Senate, and in other cases the same President has carried out the agreement without consulting that body. In the latter case he proceeds upon the accepted theory that all claims of private citizens against foreign governments are subject to political exigencies, and it is within the discretion of the Executive to urge them diplomatically upon the foreign government or not; but their submission is usually with the consent of the claimant.

No case has yet occurred where the Executive has entered into an agreement for the adjustment by arbitration of the private claim of a foreigner against the United States without securing the approval of the Senate in the form of a convention. One reason for this may be that the Executive cannot bind the government to the payment of money. Protocols, however, for the submission of claims to arbitration have been

[1] Treaties of the United States, 1025.

entered into by the United States, in which American citizens alleged indebtedness growing out of contracts with foreign governments and where the foreign governments set up a counter-claim of a balance in their favor. By the terms of submission the award if made against the American citizens was to be against them individually and not against the government of the United States.[1]

Protocols making provision for an armistice in time of hostilities are regarded as a proper exercise of his war powers by the President. Of this character was the protocol of August 12, 1898, suspending hostilities with Spain, and providing for a treaty of peace.[2]

An important protocol was signed in 1877, while an insurrection in Cuba was in progress, between the American minister in Madrid and the Spanish secretary for foreign affairs, regulating the judicial procedure in Spanish territory as regards American citizens, and this protocol was often appealed to in later years. This was held to be a mere executive construction of existing treaties and laws, and imposed no new obligation upon either government.[3]

Probably the broadest exercise of executive authority in foreign matters without the concurrence of the Senate was the protocol entered into by the United States and ten other governments with China in 1901 after the Boxer troubles, by which the various questions arising

[1] U. S. For. Rel. 1897, 479; ib. 1900, 656.

[2] For text of Protocol, S. Ex. Doc. 62, pt. 1, 55th Cong., 3d Sess. 282.

[3] U. S. Treaties, 1889, 1030; U. S. For. Rel. 1891, Appendix; for list of executive agreements see Crandall's Treaties, 86–88.

out of that uprising were adjusted, including the exaction from China of an indemnity of four hundred and fifty millions of taels. An indirect acquiescence, however, was given by the Senate in its approval of the commercial treaty with China of 1903, which sets forth in its preamble that it is made in accordance with one of the clauses of the protocol of 1901. This protocol was unilateral in its stipulations, binding only the Chinese government. Had it been otherwise, doubtless it would have been submitted to the Senate.

A case is cited by writers on the powers of the Executive, to show the acquisition of territory without the participation of the Senate. For the sole purpose of protecting navigation, such a portion of what is known as Horseshoe Reef in Niagara River as was sufficient for the erection of a lighthouse was ceded by Great Britain to the United States, in 1850, on condition that the latter would erect and maintain a lighthouse thereon, and would not fortify it. The cession was effected by the signing of a protocol, without reference to the Senate, and Congress made the necessary appropriation to carry the arrangement into effect.[1] Such a case could hardly be cited as a precedent to justify the acquisition of any considerable portion of habitable territory by executive action alone.

A reference has been made in Chapters XII and XV to the arrangement of 1817 for disarmament on the Great Lakes, effected by an exchange of notes, and the ratification of which was advised by the Senate the

[1] U. S. Treaties, 1889, 444; 9 St. at L. 380, 627; 10 ib. 343; S. Doc. 9, 50th Cong., 2d Sess. 13.

next year. In his message to the Senate, President Monroe said: "I submit to the consideration of the Senate whether this is such an arrangement as the Executive is competent to enter into by the powers vested in it by the Constitution, or is such a one as requires the advice and consent of the Senate, and, in the latter case, for their advice and consent, should it be approved."

The official records do not show why the President took this action, but it appears from the Diary of Secretary J. Q. Adams that Mr. Bagot, the British minister, raised the question with him whether or not the arrangement should receive the approval of the Senate. President Monroe at the time said he did not think it necessary. It was plainly an act of prudence, if not of duty, to do so, as the arrangement was not merely temporary, but has continued in existence to this day.[1]

The *Virginius* affair of 1874, which threatened to provoke hostilities between the United States and Spain, was adjusted by two executive protocols, signed by the secretary of state and the Spanish minister in Washington, the first providing for the surrender of the surviving passengers and crew and the vessel by Spain, and a salute to the flag; and the second, signed by the Spanish minister of foreign affairs and the American minister in Madrid, providing an indemnity for the Americans killed.[2]

Another executive arrangement for the prevention of

[1] 4 Am. State Papers, For. Rel. 202–207; H. Ex. Doc. 471, 56th Cong., 1st Sess. 14; 4 J. Q. Adams, Memoirs, 41, 84.

[2] U. S. For. Rel. 1874, 987; ib. 1875, 1220.

hostilities was that entered into by the military and naval authorities in 1860, on the disputed island of San Juan, involved in the controversy over the water boundary between British Columbia and the United States. It was agreed by them that the island should be garrisoned by equal military forces of the two nations to preserve peace and order. The agreement was approved by the Department of State and the British legation, and remained in force until 1873, when by virtue of the arbitral decision of the Emperor of Germany undisputed possession was delivered to the United States.[1]

Of a similar character were the arrangements for the reciprocal crossing of the frontier by American and Mexican troops in pursuit of marauding Indians. When first indulged in by American troops without the consent of Mexico, it brought from that country serious protests of a violation of its sovereignty. Later, with the consent of the Mexican Senate, agreements were entered into for reciprocal crossing of the frontier in pursuit of depredating Indians. These were effected by an exchange of notes or by protocol between the secretary of state and the Mexican minister, and in such case they were for a limited duration.[2]

Congress, by what is known as the Platt Amendment, in the act of March 2, 1901, fixing the basis of the relations to exist between the United States and the Republic of Cuba, provided that the latter should "sell or lease to the United States lands necessary for coaling or

[1] S. Ex. Doc. 29, 40th Cong., 2d Sess.

[2] U. S. For. Rel. 1874, 1878, 1881, 1882, Mexico; 1896, 438.

naval stations at certain specified points, to be agreed upon with the President of the United States." On February 16, 1903, the Presidents of Cuba and of the United States united in signing an agreement in which the act of Congress was recited, and whereby the Republic of Cuba leased to the United States "for the time required for the purposes of coaling and naval stations," two areas of land and water set forth by metes and bounds; and on July 2 following the same Presidents entered into another agreement, by which the United States stipulated to pay annually a sum stated as rent for the leased areas; and an extradition provision was inserted for the mutual surrender of fugitives from justice to or from such areas. The two agreements seem to be a broad exercise, on the part of the President of the United States, of the authority conferred by the act of Congress.[1]

The Constitution of the United States, Article I, Section 10, Clause 3, is as follows: "No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power." This provision has never been put in operation between a state and a foreign power, and a condition of affairs can hardly arise where Congress would deem it preferable for the state to deal with such a power rather than the federal government.

The nearest approach to such an agreement is found in the relations between the State of Maine and the Province of New Brunswick in 1839. The excitement

[1] Rev. St. Supplement II, 1604; U. S. For. Rel. 1903, 350 ff.

respecting the northeastern boundary had reached such a pitch that a border war was threatened, and General Scott was sent by the federal government to act as pacificator and to preserve order. In that capacity he proposed to the governor of New Brunswick a plan for a temporary settlement, assuring the latter that if accepted by him, it would also be approved by the authorities of the State of Maine. The plan was accepted by both parties, but the correspondence on both sides was through General Scott, and no joint agreement was signed.[1]

The regulation of fishing in the Great Lakes has been exercised by the independent action of the adjoining states and of the Dominion of Canada, and because of the want of any concert it has proved very unsatisfactory. It has been suggested that a remedy might be found in a concert of action or agreement, for instance, between the State of New York and the Province of Ontario. But no such agreement could become operative without the approval of Congress, and it would be far better that the regulation of fishing in such international waters should be through a treaty between the United States and Great Britain, respecting which the United States could doubtless exercise treaty jurisdiction.[2]

Under the clause of the Constitution above quoted, Congress has in several instances confirmed the action of state legislatures in levying tonnage duties in their ports.[3]

[1] H. Doc. 169, 26th Cong., 1st Sess.; 2 Memoirs of Gen. Scott, 334–351.
[2] 22 Op. Atty. Gen. 215.
[3] 1 Statutes at Large, 184, 190; 2 ib. 18; 5 ib. 215.

The Supreme Court has held that the authorities of the State of Vermont could not surrender a fugitive from justice to the Canadian authorities, because that involved an agreement between a state and a foreign power, without the assent of Congress.[1] But in the extradition treaty with Mexico it is provided that in case of crimes committed in the frontier states, requisitions for extradition may be made through the chief civil authority of the respective state or territory.[2]

Other executive acts of a diplomatic character are transitory measures which take the name of *modus vivendi*. These are usually made pending some treaty negotiations, they are temporary expedients to avoid friction or trouble until a permanent settlement of the questions in controversy is reached, and are made by the secretary of state with the foreign government concerned. They take the shape of an exchange of notes or of a formal protocol, and ordinarily are not submitted to the Senate for approval. Of this character was the *modus vivendi* arranged by the commissioners of the United States and Great Britain preceding the negotiations and pending the ratification of the convention of 1888, for adjusting the northeast fisheries with Canada.[3] Also, a *modus vivendi* was arranged with Great Britian, pending the negotiation of the Bering Sea fur-seal arbitration treaty, providing for the protectiom of the seals during one season, and a second *modus* was agreed upon to extend over the period of the fur-seal arbitration at Paris in

[1] 14 Peters, 540.

[2] Treaties in Force (1904), 547.

[3] For. Rel. 1885, 460 ff.; S. Ex. Doc. 113, 50th Cong., 1st Sess., p. 124.

1893. The last of these was submitted to the Senate, but the other was not submitted and went into effect by the President's proclamation alone.[1] The reason for this diverse action seems to have been that the first embraced matters purely executive in character, whereas the second undertook to bind the United States to damages as a possible result of arbitration.

Among the more recent instances of this class of executive acts is the *modus vivendi* of 1899, made by Secretary Hay, respecting part of the Alaskan boundary. The arrangement was effected by the secretary with the British chargé d'affaires in Washington, pending the settlement of the much-debated boundary question by the joint high commission to which the subject had been referred by the two governments. The constant travel and traffic with the Yukon region from the head of the Lynn canal made some temporary arrangements for customs and police purposes absolutely necessary. The arrangement fixed a line "provisionally . . . without prejudice to the claims of either party in the permanent adjustment of the international boundary."[2] A similar *modus vivendi*, as to the same boundary-line on the Stikine River, was made by Secretary Evarts and the British minister in 1878, and it continued in force up to the award of the tribunal in London in 1903.[3] Neither of these agreements went to the Senate.

The last of this class of agreements to be noticed is that growing out of the treaty negotiated by the govern-

[1] U. S. For. Rel. 1891, 570; 2 Fur Seal Arbitration, etc., Appendix, 6.
[2] U. S. For. Rel. 1899, 330.
[3] Ib. 1878, pp. 339, 346, 347.

ment of the United States with the republic of San Domingo for the adjustment and payment of the claims of American citizens and other foreigners against that republic. The treaty was submitted to the Senate for its approval during the Fifty-eighth Congress, but the Senate adjourned without any definite action upon it, and its further consideration was deferred to the next Congress.

By the terms of the treaty the collection of the customs revenues of San Domingo was to be intrusted to American officials appointed by the President of the United States, and a specified portion of these revenues was to be reserved for payment to the foreign creditors, after their claims had been adjusted. In order to preserve the *status quo* and to secure the non-interference of foreign governments, pending the action of the Senate, the President of San Domingo proposed to intrust the collection of its revenues to an officer to be nominated by the President of the United States, to deposit in a bank in New York the portion which would be reserved to the foreign creditors under the treaty, and to allow the deposit to await final action on the treaty. The President of the United States made the nomination requested, and protected the American officer and his subordinates in their duties by a display of naval force.

This is regarded as a *modus vivendi*, although it has been contended that it lacks an element of such an instrument, in that it is unilateral in its origin. It has also been charged in the Senate that it is a usurpation of power by the Executive of the United States. How

far the President, as commander-in-chief of the army and navy, may go in maintaining by force outside of the United States an existing situation pending action by the Senate, is a debatable question.[1]

Reference has been made to the question raised in the Senate in the discussion of the arbitration treaties of 1905, as to the word "agreement," in the clause providing that in each case to be submitted to The Hague Tribunal the contracting parties "shall conclude a special agreement defining clearly the matter in dispute,"[2] etc. The words, "treaties," "agreement," and "compact" appear in the Constitution of the United States in connection with foreign relations; and they have been discussed by the Supreme Court and by writers on the Constitution, but that discussion does not throw much light upon the question raised in the Senate over the arbitration treaties.[3] A well-informed writer states the issue between the Senate and the President as follows:

"As announced in the press, the position was taken by Senators that the 'special agreement' required in such case must be in the form of a treaty, duly submitted to the Senate for its advice and consent. The President, on the other hand, took the ground that the arbitration treaties, if approved by the Senate and afterwards ratified, would in themselves constitute complete legislative acts, which it would be within his powers as executive to

[1] Cong Rec. vol. 40, no. 26, 1170 ff., January 17, 1906; no. 34, 1576 ff., January 26, 1906.

[2] For text of Treaties, U. S. For. Rel. 1904, 9.

[3] 14 Peters, 540, 570; 148 U. S. 519; 153 U. S. 163; 179 U. S. 244; Story on the Constitution, sects. 1402, 1403.

carry into effect, as occasion might arise. . . . Those views the President embodied in a letter to Senator Cullom, which was in the nature of a protest against the position which Senators were understood to have taken. On receiving this letter, the Senate, with only seven dissenting votes, immediately amended the treaties by striking out of the second article the word 'agreement' and substituting for it the word 'treaty,' so that it would be necessary in each individual case before proceeding to arbitration to conclude a special 'treaty,' defining the matter in dispute and the scope of the arbitrators' powers . . ." [1] As thus amended, the President declined to carry the treaties into effect.

In taking this decisive action the Senate was doubtless influenced by two considerations. First, that, having been made by the Constitution a part of the treaty-making power, it ought not to transfer or relinquish this duty wholly to the Executive. Second, it did not regard it as prudent to commit to one person the power of deciding upon the propriety of submitting to arbitration the important questions which might arise under these treaties. By their terms all "differences which may arise of a legal nature or relating to the interpretation of treaties" were to be referred to The Hague Tribunal, provided "they do not affect the vital interests, the independence, or the honor" of the nations concerned. Here is a broad series of questions embraced in this stipulation, and the Senate felt that it would be unwise

[1] Treaties and Executive Agreements, by Prof. J. B. Moore, Political Science Quarterly, Sept., 1905. The same article contains a list of executive agreements made without the Senate's approval.

to part with its constitutional duty of participating in the determination of whether or not "they affect the vital interests" of the country.

I have thus closed my examination of the somewhat complex and multiform subject of treaty-making and treaty observance, as it has relation to the diplomacy of the United States. I trust it has shown that the interests of our country have been well guarded by those who have been charged with the delicate and responsible task of treaty negotiations with foreign powers. It must be admitted, however, that some mistakes have been made, and the government has not been entirely without fault in the observance of its international compacts. But if the history of nations for the first century and a quarter of our existence is examined, it will be found that no government has done more through these compacts to elevate the standard of international law, and that none has more faithfully and conscientiously observed its treaty obligations.

CHAPTER XVII

ARBITRATION AND ITS PROCEDURE

Arbitration as a means of settling international disputes is by no means a modern device. Herodotus, the father of history, cites instances of its observance in the ancient Persian Empire. With the Greek states it was a common practice, but always among themselves, and not extended by them to other nations. Thucydides refers to the system with approval and cites the words of the King of Sparta: "It is impossible to attack as a transgressor him who offers to lay his grievance before a tribunal of arbitration."

The dominating spirit of Rome could not tolerate the practice as applied to itself, even in the days of the Republic, and propositions for arbitration on the part of other nations were received by the Senate with sovereign contempt. It did not, however, refuse to act as arbitrator between other contending nations, and in more than one instance settled the question by annexing the territory in dispute to Rome, conduct which Cicero felt impelled to characterize as "miserable trickery." Soon after the decay of the Roman Empire there was a revival of the practice among the Franks and Visigoths. The rising power of the popes gave them a controlling influence in the international affairs of Christendom, which was often exercised through arbi-

tration of the controversies of nations. One of the wisest of them, Innocent III, declared that the pope was the sovereign mediator on earth, that peace is a duty of Christians, and that the head of the Church ought to have the power to impose it upon them. It was Pope Alexander VI who, in arbitrating the differences between Spain and Portugal, traced the celebrated imaginary line from pole to pole, dividing between them the possession of all the newly discovered countries.

The German emperors, as successors of the Cæsars, and in political affairs the rivals of the popes, set up a claim for such paramount authority as to enforce their arbitration on other nations, but their pretension was not generally accepted. Other influences also besides the Church or political preëminence in the mediæval period controlled in the matter of arbitration. The exalted character of a sovereign sometimes led contending princes to submit their differences to him; for instance, Louis IX, the saintly King of France, owing to his great wisdom and the authority of his character, was often called to act the part of conciliator or arbitrator. So also cities sometimes assumed the part of arbitrator, and eminent jurisconsults were called upon, as the professors of the Italian universities. That the practice was recognized as a wise method of adjusting disputed questions is manifest from the fact that in the great congresses or conferences of Westphalia, Ryswick, and Utrecht provision was made for the reference of certain subjects to arbitration.

As the power of the papacy began to wane and the

warlike nations rose in importance in the fifteenth and sixteenth centuries, resort to arbitration became less frequent, and almost disappeared in the seventeenth century. Rousseau cynically asked how disputes in that age could be submitted "to a tribunal of men who boasted that their power was founded exclusively on the sword, and who bowed down to God only because he is in heaven." But toward the close of the eighteenth century the nations began again to look with favor on the settlement of their differences by an appeal to reason, and the nineteenth century was the most fruitful in the history of the race in a resort to arbitration; and it is our proud boast that our own country stands at the head of the list of the nations which have most often and on the most important questions submitted their international disputes to this peaceful method of adjustment.

The United States early adopted the practice. In one of the first treaties after independence was secured, that of 1794 with England, negotiated with a view to avoid a threatened conflict, provision was made for three tribunals or commissions of arbitration; and our next important treaty, that with Spain of 1795, likewise created an arbitration commission. The practice so early adopted has been faithfully observed throughout our entire history. Our government has been a party to between seventy and eighty arbitrations of an international or semi-international character, involving twenty different nations, eleven on this hemisphere and nine on the eastern, including the most powerful and the weakest of states. As one result of this policy, the United States has been engaged in foreign wars less than five years

of its existence as an independent nation, a period of over one hundred and twenty years.

The country with which we have most often resorted to arbitration is the one with which we have had the most intimate, the most irritating and perplexing relations; and it is greatly to the credit of both the United States and Great Britain that for the last three-quarters of a century and more they have been able to settle all their differences, some of them of the most grave and threatening character, by the peaceful method of diplomacy or arbitration. The subject most fruitful of negotiation and arbitration between them, aside from claims, has been that of international boundary and territory.

The first question of this class grew out of the treaty of peace and independence of 1783. In fixing the boundaries between the United States and Canada the St. Croix River was named in the treaty as both the eastern boundary and the initial point of the northern divisional line. Very soon after the treaty the identification of the St. Croix River became a matter of dispute. Two considerable rivers emptied into Passamaquoddy Bay, one of which must have been intended as the boundary-line by the negotiators of the treaty, but neither of them was popularly known as the St. Croix. The two governments not having been able to agree upon the subject, it was stipulated in the Jay treaty of 1794 that the question of what was the St. Croix River should be submitted to the arbitration of a commission consisting of one member on the part of each government and an umpire chosen by these two commissioners. It is an indication of the spirit of conciliation which character-

ized the British commissioner that he agreed to the selection of an American citizen as umpire, late a federal judge and a prominent lawyer of New York. The commission was enabled to render a unanimous decision, which was accepted by both governments. An interesting incident of this arbitration, already noticed, was that the two surviving negotiators of the treaty of 1783 gave their testimony as witnesses. John Adams, then President of the United States, appeared in person and responded to the interrogatories of the commission, and John Jay, then Chief Justice of the Supreme Court, made a deposition.

The second question, in order of time, respecting the boundary-line submitted to arbitration, related to the islands in and adjoining Passamaquoddy Bay. The uncertainty as to these also grew out of the language of the treaty of 1783. By the provisions of the treaty of peace of 1814 this question was referred to two commissioners, one on the part of each government, and it was provided that if they failed to agree they should report to the respective governments the points of disagreement and the grounds thereof; and the governments agreed to refer the points of disagreement to the arbitration of some friendly power. Happily the commissioners were able to unite upon a joint report or decision, which was accepted by both governments.

The third question related to what was described in the treaty of 1783 as "the northwest angle of Nova Scotia" and the line along the highlands between the New England States and Canada. This proved to be one of the most irritating, difficult, and tedious of all, the

subjects of dispute between the United States and Great Britain. Diplomatic efforts to reach an agreement upon the line having failed, it was agreed by Article V of the treaty of Ghent that the subject should be submitted to two commissioners upon the same conditions as just stated respecting the determination of the line among the islands of Passamaquoddy Bay. The two commissioners first met at Portland, Maine, in 1816, and held various other sessions at different points in Canada and the United States adjacent to the region in dispute. They also caused elaborate surveys of the region to be made and charted. After vain efforts to reach an agreement they adjourned in November, 1821, submitting to their respective governments their divergent views.

Under the terms of the treaty of Ghent the matters in dispute, in case of failure by the commissioners to agree, were to be submitted to the arbitration of some friendly power, which threw the subject back into diplomacy for the naming of the arbitrator and the terms of the arbitration. Six years elapsed before these were consummated, and meanwhile the situation was further aggravated by acts of conflicting authorities in the disputed territory. Finally it was agreed in 1827 that the matter should be referred to the arbitrament of the King of the Netherlands. This submission has two features of special interest. It was the first time in the history of the United States that the treaty of submission prescribed with any detail the procedure to be observed by both parties; and it is the single instance in our history that the government of the United States has

declined to carry out the arbiter's award. It was provided that each of the contracting parties, within fifteen months after exchange of ratifications of the treaty, should prepare a statement of its case, which should be communicated to the other, and that within twenty-one months after ratifications the parties should have the right to draw up a second and definite statement, to be likewise mutually exchanged. These are what are now known in arbitration as "the case" and "counter-case." It was likewise provided that, within nine months after ratifications, each party should communicate to the other all the evidence intended to be adduced in support of its claim, and that each should, on application of the other, furnish authentic copies of acts of a public nature intended to be laid as evidence before the arbitrator, issued by its authority or in its exclusive possession. The cases, counter-cases, evidence, documents, and maps were to be laid before the arbitrator simultaneously and within two years after ratifications. He was authorized to call for further elucidation of or evidence on any specific point; and in such case the other party was to be permitted to reply by argument or evidence.

In January, 1831, the King of the Netherlands rendered his decision, not accepting the line contended for by either the United States or Great Britain, but recommending a compromise boundary or a line of convenience. The American minister at The Hague, without instructions from Washington, felt it his duty to file with the minister for foreign affairs a protest against the decision on the ground that it was a departure from the

powers delegated to the arbitrator. He stated that the question where the boundary should run, if the treaty of 1783 could not be executed, was one which the United States would submit to no sovereign. The British government manifested a disposition to aquiesce in the award, but intimated that its acceptance would not preclude the two governments from modifying the line. It is stated that President Jackson was at first inclined to accept the award and that he afterwards regretted that he did not; but he finally submitted the question of acceptance to the Senate, and that body by a vote of thirty-five to eight advised him that it was not obligatory and that new negotiations should be opened. The British government consented to reopen diplomatic negotiations, with the understanding that meanwhile the boundaries actually possessed should be observed by the authorities. The negotiations dragged along through several years and new surveys were ordered; but it was not possible for the people on the border to observe the temporary boundary understanding. Strife occurred, a state of border warfare was created, Congress authorized the President to call out the militia, and voted ten millions of dollars for public defense. General Scott was dispatched to the frontier, and a temporary truce was arranged. In 1841 Mr. Webster became secretary of state. He was well acquainted with the controversy, and besides was a statesman of the highest order of talents. Lord Ashburton was sent to Washington by the British government as a special minister to adjust this long-pending and vexatious question. The result of their negotiations was the treaty of 1842, by which the

northeastern boundary, as well as the other unsettled parts of the boundary east of the Rocky Mountains, was definitely agreed upon and fixed. Thus were questions which had three times failed of settlement by commissions or arbitration successfully adjusted by diplomatic negotiations.

The last boundary dispute between the United States and Great Britain for the settlement of which resort was had to arbitration was that of the water-line separating the possessions of the two countries south of the Vancouver island. It was provided in the Oregon boundary treaty of 1846 that the line should be drawn through "the middle of the channel which separates the continent from Vancouver's island." Soon after the treaty was proclaimed a question arose as to what was the middle channel, involving the possession of considerable island territory. Upon a failure to reach a settlement by diplomacy, the joint high commission of 1871 provided that the question should be submitted to the arbitration of the Emperor of Germany. The serious character of the dispute may be seen in the statement that it came near to causing a break-up of the joint high commission. A particular feature of this submission was that the treaty specifically set forth the claim of each government to the line, and limited the power of the arbitrator to a decision as to which was the correct claim under the treaty of 1846, thus preventing the award of a compromise line. The experience with the arbitration of the northeastern boundary by the King of the Netherlands had taught our government the importance, in a submission of territorial disputes, of making most precise

the question to be arbitrated. The award of the Emperor was in favor of the United States.

The Alaskan boundary was for a number of years a matter of dispute between the American and Canadian governments. The latter expressed a willingness to submit the subject to arbitration, but in view of the fact that the United States had been in uninterrupted possession of the territory in controversy, the public sentiment of the country would not permit such a disposition of the question. Finally a joint tribunal of six jurists, composed of three citizens or subjects from each country, was agreed upon to hear and determine the controversy by a majority of votes. This tribunal met in London in 1903, and the procedure followed was similar to that of arbitration tribunals. A decision was reached by the action of the Lord Chief Justice of England, Baron Alverstone, the president of the tribunal, in uniting with the American members.[1] The plan adopted was that suggested in the unratified treaty of 1897, to which reference will be made later.

In addition to the adjustment of boundary disputes the United States has had frequent occasion to resort to arbitration with Great Britain respecting a variety of subjects, such as the determination of claims arising out of the violation of neutral rights, the impediments interposed by the local authorities of the United States to the recovery of debts existing at the time of the revolutionary war, indemnity for slaves carried off by the British army, as to the value of fishery privileges, claims arising out of the Oregon treaty, and claims

[1] The Alaskan Boundary Tribunal, Washington, 1904.

growing out of our civil war or of a general nature. These do not call for special comment, and details of their character may be learned by a reference to the volume of treaties, but there yet remain two arbitrations with the mother country of such importance and significance as to require more than a passing notice. I refer to what are known as the Geneva and the Fur Seal international tribunals.

The most important arbitration in which the United States ever engaged, and probably the most august and impressive ever held in the world in its influence on the nations, was that arising out of the conduct of Great Britain during our civil war. In a previous volume I have referred to its historical and political aspects and I shall now confine myself to such features of it as relate to the special topic in hand. The treaty of 1871 which created it was framed by a joint high commission composed of the most distinguished statesmen and lawyers of the two countries, and its provisions as to the method of procedure have served as a guide for all subsequent tribunals of a similar character representing the two governments. The question of difference to be arbitrated grew out of acts committed by several vessels which were allowed to be built, fitted out, and to depart from British ports and which preyed upon American merchant vessels, originating what are known as the "Alabama Claims." The United States contended that the British government was responsible for all damages resulting from the acts of those vessels, because of its failure to discharge its duties as a neutral nation, because it allowed the vessels so fitted out to depart from its

ports, and because of the privileges afterward extended to them in British waters.

The treaty created a tribunal composed of one American, one British, and three neutral members, the latter to be named one each by the King of Italy, the President of Switzerland, and the Emperor of Brazil; the city of Geneva was fixed upon as the place where the tribunal should hold its sessions; its decisions were to be made by a majority; and each government was to be represented by an agent. Mr. Charles Francis Adams, our minister in London, was the American arbitrator, Bancroft Davis the agent, and Caleb Cushing, William M. Evarts, and Morrison R. Waite, afterwards Chief Justice of the Supreme Court of the United States, the counsel of the United States.

The case of each of the two parties, accompanied by the documents and evidence on which each relied, was to be delivered to the arbitrators and opposing agent within six months after the exchange of ratifications of the treaty. Within four months after the delivery of the case, the counter-case on each side was to be likewise delivered; but the arbitrators were given the power to extend the time for delivery of the counter-case for good cause shown. If either party specified any document in its own exclusive possession without annexing a copy, the other party could require a copy to be furnished; and either party had the right to call for the originals or certified copies of all papers adduced as evidence. And, finally, both parties were to deliver, within two months after delivery of the counter-case, written or printed argument; and the arbitrators, if they

desired elucidation of any point, could require a printed statement or argument, or oral argument by counsel, to which the other party had the right to make a reply. The award of the tribunal was to be rendered within three months from the close of the argument, if possible.

The treaty prescribed for the government of the tribunal three rules as to neutrality, which were to be made applicable to the case, together with such principles of international law as were not inconsistent with them. This was a new departure in international practice, and is believed to have largely contributed to the success of the American case.

The cases were duly exchanged, and when the American case became known to the public it created intense excitement and indignation in Great Britain, because of the character of its demands, which were as follows:

"1. Claims for direct losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers;

"2. The national expenditures in pursuit of these cruisers;

"3. The loss in the transfer of the American commercial marine to the British flag;

"4. The enhanced payments of insurance;

"5. The prolongation of the war and the addition of a large sum to the cost of the war and the suppression of the rebellion."

Such claims, if allowed, would reach a sum so enormous as to threaten the bankruptcy of even the British treasury. The Queen's speech to Parliament stated that

"in the case . . . of the United States, large claims have been included which are understood on my part not to be within the province of the arbitrators." On the part of the government of the United States it was held that under the treaty it had a right to have the claims enumerated under the last four clauses, known as "indirect claims," passed upon by the tribunal. The British negotiators of the treaty declared it was their understanding that the "indirect claims" were to be excluded, although they did not maintain that they had any specific agreement to that effect; and the American negotiators held a different view. It was clearly a case of honest misapprehension.[1]

The British government gave it to be understood that it would not consent to allow the arbitration to proceed until the American claim for indirect damages was withdrawn, and the American agent insisted upon the right to have the claim passed upon by the tribunal. For a time it seemed as if the arbitration was destined to miscarry, but the tribunal itself relieved the situation by making known that it would rule out and disallow the last four classes of claims contained in the American case; and thereupon the proceedings of the tribunal were resumed.

When it was about to enter upon a consideration of the case, the British agent asked that counsel of his government be permitted to present further argument on certain points in reply to the printed argument of the United States. No provision had been made for such a case in the treaty, nor for oral argument, and the

[1] Mr. Fish and the Alabama Claims, Davis, 90 ff.

tribunal decided not to admit the proposed argument. Thereupon the British arbitrator, seeking to take advantage of the provision of the treaty authorizing the tribunal to call for argument on any special point, proposed to the tribunal to ask for printed or oral argument on eight groups of questions, which would have been virtually a reopening of the whole question. The tribunal declined to adopt the proposal; but did ask for special argument on certain points, which was made orally by the leading counsel on each side and by printed arguments by associate counsel.

The decision reached by the tribunal was that as to certain vessels the British government had failed in its duty as a neutral power, and that as to other vessels it had not been negligent; and an award of damages in the lump sum of $15,500,000 was rendered in favor of the United States. The British arbitrator refused to sign the award, but asked leave to file his dissenting opinion later, which was done ten days after the adjournment of the tribunal. Portions of it were couched in offensive language, and Mr. Fish, secretary of state, declared that if the agent of the United States had had an opportunity to become acquainted with its contents he would have objected to its reception and that the tribunal probably would not have officially received it.

The result caused a temporary feeling of disappointment in Great Britain, but it removed a source of great irritation, restored the two nations to friendly relations, and was a conspicuous testimony to the value of international arbitration.

Next in importance to the Geneva arbitration was

that relating to the protection of the fur seals in Bering Sea held in Paris in 1893. The question there considered arose out of the effort on the part of the government of the United States to protect the seals on the high seas, while absent from the islands which they made their home, in quest of food or on their annual migration. During the entire time of the Russian occupation and for a number of years after the cession to the United States, the killing of the seals for their skins was confined to the males while on the islands, under careful government inspection and on the payment of a royalty which yielded a large sum annually to the treasury. Between fifteen and eighteen years after the seal islands came into the possession of the United States Canadian vessels began to engage in the business of killing the seals in the water on the high seas. This killing was necessarily indiscriminate and wasteful, as the sex could not be determined and the bodies of many that were killed were not secured. The contention of the United States was that this practice tended to the extermination of this herd of animals, useful to mankind and a source of profit to the government of the United States. It was claimed that as Russia had exercised authority on the high seas to prevent the killing of seals in the water, it was competent for the United States to pass and enforce laws prohibiting the practice in that part of Bering Sea included in the limits of the cession from Russia.

Operating under these laws, in the administration of President Cleveland in 1886 and 1887, a number of Canadian sealing vessels were seized, some of which

were condemned in the United States Court at Sitka; and in 1888 under the Harrison administration other seizures took place. These were met in 1887 by vigorous protests from the British government and large claims for damages were presented. A long diplomatic correspondence ensued, in which the seizures were sought to be justified by Secretary Blaine for the reasons above stated, and also on the ground that the government of the United States had such a property in the seals and interest in the industry of taking the skins, as gave it the right to follow them on the high seas with its protection while absent from their island home. All these positions were strongly contested by Great Britain, and on the failure to reach an agreement through ordinary diplomatic channels, the questions involved and the responsibility for damages were submitted to friendly arbitration.

The treaty provisions for the constitution of the tribunal and its procedure were very similar to those of the Geneva tribunal. The chief points of variance were as follows: Each of the contracting parties was to be represented by two members of the court, which, with the three neutral arbitrators from France, Italy, and Sweden, constituted a tribunal of seven members. The arbitrators were to be "jurists of distinguished reputation in their respective countries; and the selecting powers [were] requested to choose, if possible, jurists who are acquainted with the English language." In addition to the printed argument, each party had the right to "support the same before the arbitrators by oral argument of counsel;" and under this provision

the tribunal was in session from April 4 to July 8, mainly engaged in hearing oral arguments.

The decision of the arbitrators was against the claim of the United States to exercise jurisdiction on the high seas, the American members dissenting. But under a provision of the treaty of submission, the tribunal decided that international regulations should be adopted and observed by the two governments for the taking of the animals on the high seas "for the proper protection and preservation of the fur seals;" and it framed regulations to that end, embracing a protected zone around the islands in Bering Sea, a closed season, and certain restrictions as to weapons, vessels, etc. These regulations were adopted by the vote of one British and the three neutral arbitrators, the two Americans and the British-Canadian member dissenting. It was the intent of the tribunal to frame such regulations as would protect and preserve the herd, but in practice they have proved inadequate for the purpose.

The effect of the award was to leave the United States responsible in damages for the seizure of the Canadian vessels, and in 1896 a commission of one American and one Canadian judge was appointed to determine and assess the amount, which they found to be in the aggregate $473,151, which sum was paid by the government of the United States to the British government, and by the latter distributed to the individual claimants. The Paris award was so much less satisfactory to the United States than that of Geneva that the first impression created by it was unfavorable to international arbitration, but the better judgment of

the country is that it was a wiser settlement of the questions at issue than to push them to the extreme of war.

With other nations than Great Britain the United States has had, as already noted, frequent resort to arbitration, although the cases have mainly related to claims for pecuniary damages and have not involved any great principles of public policy. I do not deem it necessary to enter upon a detailed statement of these, as they have all been collated by Professor John Bassett Moore in six large volumes and published by the government.[1] In the succeeding chapter on International Claims some of the cases which have been found irregular or fraudulent are reviewed.

A study of the various cases of arbitration in which the United States has been a party will develop a great variety of questions of law and practice. They relate, in part, to the constitution or personnel of the tribunal, to its procedure, and to the power of the arbitrators to determine their own jurisdiction. In the arbitration of claims a still broader field of inquiry is opened up, such as the authority for and manner of presenting them, the nationality or citizenship of the claimant, the domicile, the forfeiture of national protection, who are "authorities," what constitutes a denial of justice, what are forced loans, how far cases of voluntary contract are cognizable, responsibility for damages to private pro-

[1] History and Digest of International Arbitrations to which the United States has been a Party, by John Bassett Moore, Washington, 1898. In the preceding pages of this chapter citation of authorities has been omitted, as they will be found in Moore's History and Digest.

perty by war, the measure of damages, whether or not interest should be allowed, the rules as to contraband and blockade, the practice of prize courts, and many other questions. The various tribunals or commissions have by no means been uniform in the rules laid down on these subjects, and yet, notwithstanding the conflict of decisions, a system of general principles and practice may be evolved which will prove useful in future arbitrations.

The President of the United States has been invited a number of times by foreign nations to act as a sole arbitrator in questions between them which it was not possible to adjust by diplomatic arrangement. And likewise American ministers resident in foreign capitals have been intrusted with similar duties.

A method of adjusting international disputes akin to arbitration is that of mediation. It is usually an unsolicited offer of intervention by a neutral power in a dispute to prevent war or in a flagrant war to bring about peace. If accepted by the contending nations, the mediating power has no judicial functions, as in arbitration, but its action is merely recommendatory, and has no binding force on either of the contestants. The motives of the mediator must be above suspicion, as otherwise his intervention is quite certain to be rejected. During our civil war Napoleon III sought to mediate in the contest, but Secretary Seward, convinced that he thereby desired to bring about the independence of the Southern Confederacy, refused to listen to or examine his proposal. One of the instances in which the United States has acted the part of a mediator was in 1871, in

the war carried on by Spain against the republics of Chile, Peru, Ecuador, and Bolivia, in which its good offices were accepted, and an armistice was agreed to, which after considerable delay eventuated in a treaty of peace. The American ministers at Buenos Aires and Santiago were likewise successful in 1881, in mediation between Argentina and Chile respecting the boundary. During the war between Chile and Peru in 1881 Secretary Blaine sent two special envoys to South America on a mission of peace, but they were unsuccessful in their efforts.

Various projects have been advanced for a general and permanent plan of arbitration to be adopted by the civilized nations of the earth. In the seventeenth century Henry IV of France promulgated the idea, and it was advocated by William Penn. In the past fifty years it has been often discussed. It has, however, encountered much opposition, and even its ardent friends recognize that it is subject to serious difficulties in its practical operation. One of the objections is that any fixed plan of general arbitration tends to weaken diplomatic settlement. In the international relations of states even at the present day ten times as many disputes are adjusted by diplomatic negotiations as are referred to arbitration. The fear is expressed that a general agreement of nations to arbitrate their irreconcilable differences would in large measure destroy the efficiency of diplomatic settlement. Arbitration is a surrender of sovereignty, and it is a serious matter for a nation to part from the control of a whole class of questions. It is contended that certain subjects, such as the honor of a nation,

its policy, and possibly territorial questions, cannot be committed to the adjudication of a tribunal. When the attempt is made to arrange the class of cases to be submitted for arbitration, great difficulty in agreement is encountered.

The composition of the tribunal is not easy. It has usually been the practice to include in it a member from each of the arbitrating nations, but they almost invariably become advocates rather than judges. The propensity to follow partisan predilections is illustrated by the electoral joint commission organized to settle the Hayes-Tilden presidential contest, when every one of the fifteen members voted in accord with his party attachment.

It has been found much easier for nations to lay down a rule than to follow it. The Great Powers at the Paris Conference of 1856 resolved thereafter to resort to mediation for the settlement of their disputes, but since then they have resorted to war more often than to mediation. Prussia and Denmark had a treaty with a clause, now not uncommon among nations, pledging them to adjust their differences by arbitration, but that did not prevent the Schleswig-Holstein war.

The friends of universal arbitration, in reply to the contention that such a general scheme among the nations is impracticable and visionary, have often cited the Supreme Court of the United States as an illustration of what may be accomplished by an international tribunal of arbitration. Power has been conferred upon that court by forty-five distinct political entities, sovereign in their internal or domestic affairs, to act as an

arbiter or judge between them in their disputes and between their respective citizens. The analogy, it must be confessed, is not complete, but it illustrates what the ardent friends of international arbitration hope to accomplish.

Among the various attempts to agree upon some general plan of arbitration or other peaceful settlement of international disputes may be mentioned the deliberations of the Congress of Vienna in 1815, the agreement of the Germanic Confederation in 1834 for application among the German States, the conferences of certain of the Spanish-American States at Caracas in 1883 and at other times, and the efforts of the Institute of International Law at various sessions in recent years. As noticed, a number of nations have agreed in separate treaties with other powers to resort to arbitration rather than war, an example of which will be found in Article 21 of the treaty of 1848 between the United States and Mexico. The most recent and most complete treaty of this class is that signed between Italy and the Argentine Republic July 23, 1898. It has the following characteristic features: It provides that all questions, without exception, shall be submitted to arbitration; that none of the arbitrators shall be citizens or residents of either country; that the sessions of the tribunals shall be held outside the territory of either state; that it shall have power to decide as to its own jurisdiction; and provision is made for a revision by the tribunal of its award, first, if false documents have been used, or, second, if the award is based upon an error of fact.

The United States, in addition to its record of frequent arbitration in special cases, has made efforts to reach a general plan of arbitration. This was notably the case in the Pan-American conference of 1890, in which all the independent nations of this hemisphere were represented. A general scheme of arbitration applicable to all the American nations was one of the announced leading objects of the conference, and when the subject was first introduced it seemed that all the delegates approved of it; but when the details of the plan came to be framed it was found that some of the nations did not favor unrestricted arbitration. Mexico had then a pending dispute with Guatemala, and Chile and Argentina were quarreling about their boundary, and these three nations manifested an indisposition to accede to the project. Mr. Blaine, secretary of state, took a deep interest in its success and sought to exercise his personal and official influence to secure unanimous action, but without satisfactory results. A draft of treaty was agreed upon and the majority of the nations represented signed it, including the United States, but owing to the attitude of the non-signatory countries it was never ratified, and the movement proved a failure.

A more recent effort to agree upon and put in operation a general plan of arbitration has been attended with similar fruitless results. On the part of the friends of peace it was felt that if the two great English-speaking nations could frame a treaty for the settlement of all differences which might arise between them, it would be a long step toward the accomplishment of a general

plan for all the civilized nations. Through a concerted movement in the United States and Great Britain, Congress and Parliament passed resolutions favoring such a treaty, and in May, 1896, a large and representative convention was held in Washington, embracing among its delegates many of the most prominent and intelligent of our citizens, which also declared in favor of such a treaty. This was followed in January, 1897, by a treaty of arbitration, signed by Secretary Olney and the British ambassador. It contemplated the settlement of questions in difference between the United States and Great Britain which they might fail to adjust by diplomatic negotiations, and divided them into two classes. Matters of claims and others which did not involve territorial questions or national rights were to be submitted to an international tribunal of arbitration in the usual form and they were to be determined by a majority vote. The other class of questions was to be referred to a tribunal of six members, composed of three justices of the Supreme Court or Circuit Courts of the United States, and three judges of the British Supreme Court of Judicature or Privy Council, and their decision should not be final unless it was by a vote of five to one. The treaty was limited in its duration to five years, unless longer continued by mutual consent.

It would seem as if the interests of the two countries were properly guarded in the treaty, and it met with the hearty approval of the friends of arbitration. But when it was submitted to the Senate for ratification a strong opposition was developed, and after a long discussion it was rejected because of failure to secure the

necessary two-thirds vote in its favor, although it received the support of a considerable majority of the senators.

One of the latest and most successful efforts to frame a general treaty among the nations on the subject was that of the International Conference at The Hague in 1899, which agreed upon a treaty. This distinguished body of diplomats and statesmen had before them, among others, three plans submitted, respectively, by the United States, Great Britain, and Russia. That of the United States was for the creation of a permanent tribunal, composed of one person selected by each of the participating nations on account of his personal integrity and learning in international law. This tribunal was to have a continuous existence and an office for the filing of cases. Any of the nations represented in the tribunal could by special treaties agree to submit their differences to this tribunal sitting as an entire body, or they might select any number not less than three, and in the latter case none of them was to be a citizen of the litigating states. The British plan was quite similar to that of the United States, but it went more into detail respecting the organization and procedure of the tribunal. The Russian plan was made the basis of the treaty finally agreed upon and signed, and is entitled "A convention for the peaceful settlement of international disputes."[1]

This convention contains four titles and sixty-one articles. The first title is declaratory, the signatory powers agreeing "to employ all their efforts to assure

[1] U. S. Treaties in Force, 907.

the peaceful settlement of international differences." The second provides for the exercise of good offices or mediation. The third title provides for the creation of commissions of inquiry of disinterested parties for the determination of questions of fact, such for instance as the cause of the destruction of the Maine. Each signatory power is left free to accept or reject proffered mediation or inquiry, or to receive or decline the findings of fact, nor are these steps necessarily to stop the preparations for or progress of war. The fourth title relates to arbitration and makes up much the greater part of the convention. It especially treats of two subjects, a permanent tribunal and arbitration procedure. The membership of the tribunal is to comprise not more than four persons nominated by each one of the signatory states, its offices are to be located at The Hague, and the Netherlands minister of foreign affairs and the resident ministers of the powers there are to be its administrative council. The members of this tribunal, in such numbers as may be agreed upon by the arbitrating parties, are to hold themselves ready for service when called upon, but unless so called they are to have no functions. The method and rules of procedure are laid down in considerable detail, and follow very much the course marked out for the Geneva and Bering Sea tribunals already described.

Several cases have been submitted to The Hague Court under the provisions of this treaty, and its results thus far have been satisfactory and encouraging. The chief defect of the treaty is that there is no provision for compulsory arbitration, not even of claims,

and each signatory power is left free to accept or decline arbitration at will. An effort has been made to remedy this defect by a number of the nations who are signatory parties uniting in separate conventions stipulating for arbitration by The Hague Court in all questions of a judicial character or relating to the interpretation of treaties, provided they do not involve, in the judgment of either party, the independence, the honor, or vital interests of the country.

Nine conventions of this character were signed between the United States and various European powers and Mexico, and submitted to the Senate for its approval. I referred in the last chapter to the question raised between the president and that body, and the consequent failure of the treaties to go into operation. This action does not indicate an opposition on the part of either the President or the Senate to the principle of international arbitration. Both will doubtless be found ready on all suitable occasions to maintain the high reputation the United States has established for the settlement of controversies with other countries by this peaceful method of adjustment when diplomacy fails.

The governments which united in the first international conference at The Hague have signified their readiness to join in another conference at the same place, to study the promotion of peace among the nations, and it is soon to assemble. The cases which have already been heard before The Hague Court have developed some imperfections in the provisions of the treaty, and at the coming conference an effort will be

made to remedy them, as well as to consider other subjects for the promotion of concord among peoples.

The establishment of The Hague Court and the resort of so many nations to it for the settlement of their differences are a most hopeful augury for the future. Wars unhappily are not yet to cease on the earth, but we have reached a stage in the world's progress when peace is recognized as the normal state for the nations, and when the appeal to reason will more and more continue to prevail over force.

CHAPTER XVIII

INTERNATIONAL CLAIMS

No other branch of international relations presents to the American diplomatic representative such a fruitful source of embarrassment as the private claims of his countrymen against the government to which he is accredited. This is especially the case in the countries on this hemisphere, or in other parts of the world where public order is not well established, or where the judiciary system is imperfect or different from that of the United States. It is neither a gracious nor a welcome act for a diplomat to remind the government with which he is expected to cultivate friendly relations that it is derelict in its duties and obligations to his countrymen.

Claims of this character fall into two classes — first, those based on contracts; and, second, those founded on torts, that is, injuries or wrongs done to individuals independent of contracts. In a single chapter it will be possible to make only a brief reference to some of the general principles governing them, referring the reader for detailed discussion to international law text-books and diplomatic correspondence.

The first of these, contractual claims, usually grow out of the voluntary acts of individuals who enter into contracts or agreements with the central government or other authorities of a foreign country for the construc-

tion, for instance, of a railroad or other work or enterprise of a public, municipal or local character, or who purchase bonds or obligations of a government, state, or municipality. In such cases the government of the United States has held that it will not undertake to follow its citizens with its protection; that when they enter into such relations they are presumed to have fully considered the disposition and ability of the foreign authorities to perform their obligations; that having taken risks in the hope of securing large profits they must not complain if their government requires them to stand upon the same footing as native citizens or subjects in the relief to be afforded them; and that all they can expect is that their government will in meritorious cases exercise its unofficial good offices in their behalf.[1]

The methods sometimes resorted to by governments to compel by force an adjustment of the claims of their citizens or subjects can be illustrated by a few examples. Great Britain, France, and Spain united, in 1861, in a naval and military expedition against Mexico to enforce the claims of their subjects for injuries and damages alleged to have been sustained during the civil wars of that period; and they invited the United States to join them in the expedition, as Americans had likewise suffered from the revolutions. Secretary Seward, however, declined to be a party to the armed expedition, informing the allies that "the United States do not feel inclined to resort to forcible remedies for their claims at the present moment, when the Government of Mexico is deeply disturbed by factions within, and exposed to

[1] For citation of authorities, 2 Wharton's Digest, 654 ff.

war with foreign nations."[1] After landing at Vera Cruz and advancing some distance into the interior, dissensions arose among the allies; the British and Spanish forces withdrew from the country, and left the French alone to pursue their plans, which proved to be rather the overthrow of the republican government than the collection of the claims of their subjects.

In 1894 the government of Nicaragua arrested the British vice-consul and nearly a score of other subjects and expelled them from the country, on the charge of conspiring to overthrow the local authorities and to maintain the pretensions of an Indian chief. After examining the charges as formulated by the Nicaraguan government the British foreign office decided that they were not sustained, a demand was made for the payment of £15,500 as compensation for personal injuries, and a commission to assess the property losses sustained by them. A British squadron was sent to the chief Nicaraguan port to enforce payment and an armed party seized the government offices. Nicaragua asked that the question of the legality and justice of its acts be submitted to arbitration, but this was refused, and there was no other recourse than to comply with the British demand.[2]

Great Britain, Germany, and Italy united, in 1902, in a naval expedition against Venezuela to enforce the claims of various of their subjects. These claims almost wholly were of a contractual character and their justice disputed. Before the blockade of Venezuelan ports took

[1] 52 British and For. St. Papers, 394.

[2] U. S. For. Rel. 1894, 1895, Nicaragua.

place the allied governments gave assurances to the United States that no territorial acquisition was contemplated. After the ports had been seized, through the influence of the President of the United States an agreement was reached to submit the claims of the allies and also those of other countries to arbitration.

All of these cases cited were the arbitrary acts of strong nations against weak nations, enfeebled by intestine strife. It is an acknowledged principle of international law that independent states stand on a perfect equality one with another, and by virtue of this sovereignty and independence they are entitled to equal consideration and treatment. The intervention which has just been described would never have taken place against nations equal in military strength with these debt-collecting aggressors. Some other means than force would have been used to reach an adjustment.

While the blockade of Venezuelan ports was being maintained, the secretary of foreign relations of the Argentine Republic, Dr. Drago, brought to the attention of the secretary of state of the United States the views of his government on the subject, in an able note addressed to the Argentine minister in Washington. His position, briefly stated, was that the principles of international law did not justify one nation in exacting by force of arms the payment by another nation of public debts (that is, contractual obligations) due to the citizens of the former.

He enforced this position by cogent arguments, and none more effective than his citation of the uniform position of the United States. He quoted from Alexan-

der Hamilton as follows: "Contracts between a nation and private individuals are obligatory according to the conscience of the sovereign, and may not be the object of compelling force. They confer no right of action contrary to the sovereign will." He also cited the fact that the people of the United States, by an amendment of the federal Constitution (XI), had prohibited foreigners from enforcing their claims against the states of the Union by judicial suits.

He asserted that the principle of international law for which he contended was a necessary corollary of the Monroe Doctrine, as the enforcement of public debts could not be made effective, in case of resistance, without the occupation of territory. He conceded that the Latin-American nations had often defaulted on their financial obligations, and he claimed that the views he advanced were in nowise a defense of bad faith, disorder, and voluntary insolvency, but were put forth in the interest of national independence and sovereignty. "Long, perhaps," he wrote, "is the road that the South American nations still have to travel. But they have faith enough and energy and worth sufficient to bring them to their final development and mutual support."

He closed his note, inspired by the European naval intervention in the affairs of Venezuela, with the request that the government of the United States might be informed of "our point of view regarding the events in the future development of which that government is to take so important a part, in order that it may have it in mind as the sincere expression of the sentiments of a nation that has faith in its destiny and in that of this

whole continent, at whose head march the United States, realizing our ideals and affording us examples."[1]

This diplomatic paper was widely published at the time by the press of the United States, and was quite generally applauded as a wise and proper exposition of the doctrine which the governments of the American hemisphere should adopt as a continental policy and should seek to have recognized as a principle of international law by the nations of the world. The practice followed by European governments of enforcing the contractual claims of their subjects against the weaker American nations was the origin of the present uncertain relation of the United States toward the Republic of San Domingo to which I have made reference in a preceding chapter. The situation was fully and forcibly stated in the President's annual message of December 5, 1905, from which the following extract is taken:

"Our own government has always refused to enforce such contractual obligations on behalf of its citizens by an appeal to arms. It is much to be wished that all foreign governments would take the same view. But they do not; and in consequence we are liable at any time to be brought face to face with disagreeable alternatives. . . . The previous rulers of Santo Domingo had recklessly incurred debts, and owing to her internal disorders she had ceased to be able to provide means of paying the debts. The patience of her foreign creditors had become exhausted, and at least two foreign nations were on the point of intervention, and were only prevented from intervening by the unofficial assurance of

[1] U. S. For. Rel. 1902, 1.

this Government that it would itself strive to help Santo Domingo in her hour of need. In the case of one of these nations, only the actual opening of negotiations to this end by our Government prevented the seizure of territory in Santo Domingo by a European power. Of the debts incurred some were just, while some were not of a character which really renders it obligatory on, or proper for, Santo Domingo to pay them in full."

It is understood that one of the European nations alluded to by the President was Belgium. The character of the claims for which that government was threatening armed reprisals was explained in a speech by Senator Rayner during the consideration of the subject presented by the message of the President. An extract from the annual report of the London Council of the Corporation of Foreign Bondholders, which he read in the Senate, shows that in 1869 a Belgian subject entered into a contract with the government of San Domingo for the construction of railways in that republic. Under the contract the government issued bonds to the amount of £750,000, secured by a pledge on the customs and internal taxes. The bonds sold for fifty per cent of their face value. Of the sum realized the contractor received £100,000 as his fee and the government of San Domingo only £38,000; and it had obligated itself to pay annually for interest and sinking fund £58,900. It does not appear from the report that any portion of the railways was constructed.[1]

[1] Congressional Record, vol. 40, no. 18, 792, Jan. 8, 1906.

In a spirit of sarcasm the Senator thus pictured the threatened armed conflict: "The battle-cry of the British Navy has been 'England expects

The general rule as to the second class of claims — those founded on torts — is that the injured party must in the first instance seek his remedy through the authorities of the country where the injury was inflicted; but if he encounters a denial of justice or no remedy is afforded, his own government will assume the protection of his claim and seek to have it satisfied.

The foregoing rule is qualified, however, in various ways. For example, a government is not responsible to foreigners for injuries received by them from the operations of war in its territory, or from insurgents whom it could not control or whom the claimant's government has recognized as belligerents. The language of Secretary Marcy is: "The undersigned is not aware that the principle that foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of war, has ever been seriously controverted or departed from in practice."[1]

Secretary Webster, in the case of the riot in 1851 against Spanish subjects resident at New Orleans enunciated the principle that foreigners residing in the

every man to do his duty;' this battle-cry shall be 'Belgium expects every man to collect his money.' The dying words of Lawrence were 'Don't give up the ship, boys;' here the flagship shall signal to the fleet 'Don't give up your coupons, boys;' and as the battle closes the valiant crew of brokers, bankers, underwriters, and promoters, paraphrasing the thrilling words of Perry, can flash a cable to the Westerndoops of Amsterdam: 'The revenue cutters and the customhouses of Puerto Plata and Monte Christi have fallen; we have met the enemy and they are ours. Advance the bid on Dominican bonds.'"

For a discussion of the Monroe Doctrine as presented in the San Domingo question, see Senator Rayner's speech here cited.

[1] 2 Wharton's Digest, 612 ff.; 2 ib. 576–586.

United States are not entitled to greater protection than the laws afford to citizens of the country; that they must resort to the local authorities and courts for a redress of their injuries; and that the federal government is not responsible in pecuniary damages for losses occasioned by mobs. The same principle was maintained by Secretaries Evarts and Bayard in the riots against Chinese subjects, and by Secretary Blaine in the lynching of Italians at New Orleans. Nevertheless, in all these cases Congress, on the recommendation of the Executive and as an act of grace and comity, has made appropriations for the payment of damages sustained.[1]

The claims of American citizens against foreign governments must be presented through the Department of State. A set of rules has been adopted by that department, with printed instructions as to the manner of their preparation, which are furnished to all applicants. The diplomatic representatives of the United States are enjoined by the printed instructions not to present such claims except under instructions from the department.[2] Neither is it proper that they should manifest an undue interest in pressing them. Some American representatives have fallen into discredit and awakened suspicion by special activity in behalf of their claimant countrymen.

Aliens preferring claims against the United States are required to present them through the diplomatic

[1] H. Ex. Doc. 113, 32d Cong., 1st Sess.; 10 Stat. at L. 89; H. Ex. Doc. 102, 49th Cong., 1st Sess.; U. S. For. Rel. 1891, 682, 727.

[2] Printed Instructions, 68.

representative of their government in Washington. They cannot submit them directly to the Department of State, nor can they apply to Congress for relief.

Claims of citizens of the United States against foreign governments and claims of aliens against the United States may be examined and passed upon by the Department of State, in which there is a bureau for that purpose, in charge of an officer of the department of justice, learned in the law. This bureau is often overburdened with work, and at best the process of securing an adjudication by the respective governments is tedious. When there is a diplomatic deadlock, resort is often had to arbitration.

In case of an accumulation of claims between governments, it is quite the practice to submit them to a mixed commission with an umpire. Several of such commissions have been created between the United States and Great Britain and other powers. After the civil war the government of the United States found itself embarrassed with a large number of claims of aliens. Mixed commissions were agreed upon with Mexico in 1868, with Great Britain in 1871, and with France in 1880. These commissions, as well as others in which the United States has been a party, developed the fact that individuals are accustomed very greatly to exaggerate their claims against governments. In the American and Mexican commission American citizens filed claims against Mexico to the enormous amount of $470,000,000, and obtained awards for only $4,125,000 (of which more than one fourth was afterwards proved to be fraudulent), considerably less than one per

cent of the gross sum claimed. In the British commission claims were filed against the United States for $96,000,000 and less than $2,000,000 was awarded. In the French commission the claims against the United States amounted to $35,000,000, and $650,000 was awarded. In these two commissions the awards were less than two per cent of the sums claimed.

The method of adjusting claims by mixed or international commissions has been found to be quite expensive and by no means prompt. The personnel of the commissions is usually made up of individuals who have never before served in such capacity, are chosen for a temporary duty, and in some instances are not even educated lawyers. The result is that their decisions are conflicting, and not always in consonance with international law and established principles of jurisprudence. For these reasons, and because there were still a large number of unsettled alien war claims, in 1873 President Grant recommended to Congress the creation of a special court to hear and determine the claims of aliens against the United States.[1]

Secretary Fish, in elaborating and enforcing the President's recommendation, proposed that the court should consist of three members and that an appeal from it should lie to the United States Supreme Court. To this court the claims of citizens or subjects of foreign states against the United States were to be referred by the secretary of state, with the concurrence of the foreign government. Such a court would take a large amount of vexatious business out of diplomacy. It

[1] 7 Presidents' Messages, 237.

would be a guard against the surprises to which commissions are exposed, against *ex parte* testimony and perjury. It would tend to expedite cases, would give uniformity in practice as well as uniformity in the tenor of decisions. With an appeal to the Supreme Court, there would be an assurance of the establishment of well-founded principles which would become engrafted into accepted international law.[1]

A bill was introduced on the subject, and the Committee of the House to which it was referred submitted an elaborate report on the subject, recommending that jurisdiction be conferred upon the existing Court of Claims for the purposes stated, that court already having a limited jurisdiction as to foreign claims. No action was had upon the subject. It has been suggested in the Conference of the American Republics that a permanent court of claims be created for all the American nations. A permanent court would be an improvement over the existing practice of special commissions.

As has already been shown the United States has frequently resorted to arbitration to settle disputed claims, and this process has been found satisfactory in most cases. In some instances, however, it has appeared after the awards were rendered that they had been secured by fraud and perjury or by other corrupt methods, and in all such cases, when the awards have been in favor of American citizens, the government of the United States has not hesitated to undo the wrong inflicted on other governments. It will be of interest to notice some of these cases.

[1] H. Report no. 134, 42d Cong., 2d Sess. 4.

A conspicuous instance where the award was questioned and not enforced is that under the claims convention of 1866 with Venezuela. This is the only case in our history where fraud and corruption have been established against an arbitration tribunal. Awards were rendered in favor of American citizens to the amount of over $1,250,000; but soon after the adjournment of the commission in 1868 charges of irregularity and fraud on the part of its members were made at Washington by the Venezuelan government, and an investigation established, to the satisfaction of the Congress of the United States, the fact that a corrupt arrangement had been made between the American commissioner, the umpire (a Venezuelan), the United States minister to Venezuela, and his relative, the leading attorney before the commission, by which a large part of each claim represented by the latter and allowed by the commission was to be divided among the persons named. Awards upon the claims held by this attorney made up about two thirds in amount of the total awards, and several meritorious claims not presented by him were rejected. For many years the successful claimants and the other parties interested were able to obstruct legislation to correct the wrong. For a time Venezuela made payment in installments as provided, but after some years had passed without relief further payments were suspended. Finally a new treaty reopening all the cases was passed and went into effect in June, 1889, more than twenty years after the first commission adjourned, and a new commission met in October, 1889, and completed its labors in September, 1890. The

result was that of the twenty-four claims allowed by the old commission only nine were passed on favorably, in the sum of $356,000, instead of $1,250,000; and three old claims rejected by the former were allowed by the new commission to the amount of $415,000.[1]

Two claims for alleged damages sustained by American citizens at the hands of the authorities of Haiti, after being adopted and strongly pressed diplomatically by the United States, were submitted to arbitration by a diplomatic protocol in 1884. A single arbitrator was appointed in the person of a retired justice of the Supreme Court of the United States, and in 1885 an award was rendered in both cases in sums aggregating $175,000. Soon after the awards were made charges of fraud on the part of the claimants were preferred, and a motion was heard by the arbitrator to reopen one of the cases on the ground of newly discovered evidence. The latter held that his power over the award was extinct, but stated that the newly discovered evidence would have materially affected his decision if it had been presented in time. Mr. Bayard, secretary of state, made an investigation in the light of new facts, and held that neither of the cases had any foundation in justice, and that a sovereign state could not in honor press an unconscionable and unjust award. The Haitian government was accordingly released from the payment of these claims.[2]

In 1858 a claim held by an American company against the Republic of Paraguay was submitted to arbitration by the two governments. The commissioners united

[1] 2 Moore's Int. Arbitrations, chap. 39.

[2] U. S. For. Rel. 1887, 593.

in an award rejecting the claim. President Buchanan declined to accept the award on the ground that the commissioners had exceeded their powers in this, that Paraguay had accepted responsibility for the acts complained of, and that the only question submitted to them was the amount of damages sustained. Repeated but fruitless efforts were made to secure a recognition of the claim, and of late years it has ceased to receive the attention of the Department of State.[1]

The claim of the owners of two American vessels, seized by Peruvian authorities in the revolution of 1856, was the subject of much correspondence and finally resulted in the suspension of diplomatic relations. In 1862 a convention was signed referring the claim to the decision of the King of the Belgians. Official notice of his selection was given to the King by the two governments, but, before the case had been formally submitted to him, he informed the governments that he could not accept the trust. The minister of the United States at Brussels reported confidentially to the secretary of state that, in an interview with the King, his Majesty stated that he had looked into the case and found that if he accepted the position of arbiter he would have been constrained to make a decision unfavorable to the United States, and that this had been his motive for declining, although he had alleged other reasons. Upon receiving this information Secretary Seward addressed a note to the Peruvian minister in Washington advising him that it was not the intention of our government to pursue the subject further. The Peruvian government

[1] 2 Moore's Int. Arbitrations, 1485.

expressed its appreciation of what it termed a spontaneous act of moderation and justice.[1]

American citizens sustained certain damages on account of the war between China and Great Britain, and in 1858 by the terms of a convention with the minister of the United States the Chinese government paid over to him the lump sum of $735,000 in satisfaction of the claims. A domestic commission was appointed by the United States to assess the damages, and it was found that these had been greatly exaggerated. After all possible claims had been paid, a large sum remained in the United States Treasury. After being there for many years, Congress in 1885 directed the return of the balance, $453,400, to the Chinese government. The minister in Washington, in acknowledging its receipt, said: "This generous return . . . cannot fail to elicit feelings of kindness and admiration on the part of the government of China."[2]

A convention was entered into between the United States and Mexico in 1868 whereby the claims of the citizens of both countries were referred to an international tribunal composed of one American commissioner, one Mexican commissioner, and an umpire from a neutral nation, to whom were referred all cases on which the commissioners were divided. The commission rendered awards against Mexico in favor of American citizens in the sum of over $4,000,000. Immediately after the adjournment, in 1876, the Mexican government came into possession of newly discovered evidence, which if not successfully rebutted, would establish the

[1] Moore's Int. Arbitrations, 1612. [2] U. S. For. Rel. 1885, 182.

fact that two of the claims (La Abra and Weil), to the amount of $1,170,000, were without merit and absolutely fraudulent. This evidence was laid before the secretary of state and informally brought to the attention of Congress, which body in 1878 passed an act authorizing the secretary of state to withhold payment to the claimants until the charges could be investigated, with a view to protecting "the honor of the United States." Upon the evidence submitted by Mexico, the secretary of state decided that the evidence brought into grave doubt the substantial integrity of the claims, and "that the honor of the United States does require that the two cases should be further investigated by the United States to ascertain whether this government has been made the means of enforcing against a friendly power claims of her citizens based upon or exaggerated by fraud." He reported to the President that his Department was not clothed with sufficient judicial powers to make the investigation, and the subject was referred back to Congress for further legislation.

All efforts to that end were strongly resisted in Congress by the claimants on the ground that the question was *res judicata*, that the parties to the award had acquired vested rights of which they could not be deprived, that the award of an international tribunal could not be reopened, and that Congress was without power to provide for a rehearing of the cases. Under the provisions of the convention Mexico was paying to the United States the amount due on the awards in installments of $300,000, annually, and after three years had passed without legislation, the secretary of state decided

to pay to the claimants in the two cases the installments then received. But the succeeding secretary of state suspended all further payments, and there accumulated in the treasury of the United States $750,000, paid in by Mexico on account of these two awards. Two attempts were made by the claimants to obtain possession of this money by writ of mandamus from the District Court upon the secretary of state, but in both instances on appeal to the United States Supreme Court the writ was refused. In its decision this court said: "As between the United States and the claimants, the honesty of the claim is always open to inquiry for the purpose of fair dealing with the government against which, through the United States, a claim has been made."

After still further years of delay, occasioned by the obstructive tactics of the claimants, in 1892 Congress passed an act referring the two cases to the Court of Claims for investigation, to determine whether the awards had been obtained by fraud and perjury, and if so found the money in the treasury was to be returned to Mexico.[1] The rehearing dragged along through six years when the Court of Claims decided that the awards had been obtained by fraud and perjury and that the money on deposit in the Department of State should be returned to Mexico; and upon appeal by the claimants in one of the cases to the Supreme Court the decision was affirmed in December, 1899.

[1] For history of these cases to this point, 2 Moore's Int. Arbitrations, 1324–1348. A claim of similar character to that of La Abra was that of George A. Gardiner, fully reported in the same volume, 1255 ff.

The money retained by the Secretary of State was, thereupon, returned by him to Mexico; and the fraud was so fully established that Congress made an appropriation sufficient to make good the amount distributed to the claimants, and the full sum of the awards was returned to Mexico.[1] It has thus been determined that international arbitration cannot be used by claimants to perpetrate or perpetuate fraud, and that, in the language of the Supreme Court, "no technical rules of pleading, as applied in municipal courts, ought ever to be allowed to stand in the way of the national power to do what is right under all the circumstances."

The foregoing cases show that, though the government of the United States is not infrequently misled by designing claimants and by the unwise action of its diplomatic representatives, it has not hesitated when fully possessed of the facts to undo any injustice inflicted upon friendly powers by means of claims commissions; and that fraud, once exposed, cannot reap the benefits of its iniquity under the cover of the finality of an international award.

It is gratifying to record that in other matters involving international claims and indemnities the United States has exhibited a spirit of liberality and fair dealing, especially towards weaker nations. The return of the undistributed balance of the Chinese claims indemnity of 1858 has been already cited. The return to Japan in 1883 of the sum exacted from it in 1863, as an indemnity for expenses of the naval expedition in con-

[1] 32 Court of Claims, 462; 35 Ib. 42; 178 U. S. 423; U. S. For. Rel. 1900, 781, 783; 32 St. at L. 5.

junction with three European powers to force an opening of the Strait of Shimonoseki, is another evidence of the disposition of the United States in that direction.[1] There remains, however, an undetermined question of this character on the part of the government of the United States.

In 1901 the United States united with the other foreign powers represented at Peking in compelling China to make amends for the aggressions attending the Boxer outbreak of 1900. Among other requirements the sum of 450,000,000 taels was fixed upon by the powers as an indemnity to be paid for losses and expenses "of States, companies or societies, private individuals, and Chinese" in the employ of foreigners, on account of the Boxer troubles. The Chinese government objected to this amount as excessive and beyond its ability to pay, and proposed to submit the indemnities to The Hague Court for examination and adjudication. The representative of the United States was willing to make this reference or, as an alternative, to agree to a reduction of the amount demanded, but he was overruled by his European colleagues; and China was forced to submit to the military duress.[2]

[1] U. S. For. Rel. 1883, 606.

[2] The indemnity was distributed as follows:

	Taels.
Germany	90,070,515
Belgium	8,484,345
United States	32,938,055[1]
France	70,873,240
Great Britain	50,712,795

[1] Equivalent of $24,168,357.

For details as to the negotiations, see U. S. For. Rel. 1901, App. China.

It does not appear officially how this enormous sum was estimated, but subsequent events have shown that there entered into the grand total greatly exaggerated private claims. As an instance of this it is stated that the Belgian Company engaged in the construction of the railroad from Peking to Hankow filed its claim for losses at 30,000,000 francs, and that its damages as assessed were only 3,000,000 francs; and it is understood that there were many other claims of a like character.[1] The private claims of Americans were examined and fixed by a committee of United States officials appointed by the American minister at Peking. It is understood that they aggregated approximately only $2,000,000, and that they have all been paid. Such being the case, there will remain in the treasury of the United States, when the installments of the indemnity are fully paid, the sum of about twenty-two millions of dollars.

What is to be done with this large treasure? It is being collected by the Chinese government by levying additional burdens upon the people, already oppressed with heavy taxation. Its exaction is increasing the bitter hostility existing against foreigners. Various propositions are being advanced for its use by the United States. Similar propositions were made respecting the

Italy	26,617,005
Japan	34,793,100
Russia	130,371,120
Other powers	5,226,075

The entire indemnities aggregated, say, 450,000,000 taels.

[1] 1 The Re-Shaping of the Far East, Weale, New York, 1905, 183.

Japanese indemnity, but Congress decided against them all, and by its final action it determined that such a fund could not be properly appropriated to pay the military expenses of the expedition. After disturbing the conscience of Congress for twenty years, the money was returned to Japan.

The public press has reported that Secretary Hay, whose high sense of justice led him to revolt against the exorbitant demands of the European powers, advised the President to ask Congress to return to China the amount in the treasury and to release that government from further payments; but it further reports that, in view of the attitude of the Chinese people on the boycott of American goods, such contemplated action may not be taken. The President of the United States has stated publicly that the injustice done the Chinese through the harsh exclusion laws of the United States was the cause of the boycott. An acquittance of two wrongs can hardly be accomplished by the commission of a third. It is not doubted that the honorable record which the United States has made for fair dealing in the matter of international indemnities will in this instance be maintained.

The task set for this treatise has been completed, so far as it has been found possible within the compass of a moderate volume. The attempt to develop the practice of diplomacy, as illustrated in the foreign relations of the United States, was made with a view to showing the part taken therein by the representatives of this government, and the influence they have exercised in ele-

vating the standard of that practice. When our country declared its independence and sought intercourse with foreign nations the standard of diplomacy was very low. Even in time of peace it did not hesitate to make use of bribery, espionage, and deliberate deceit. It is a hopeful evidence of the progress of the nations that no self-respecting government to-day would countenance such practices in its foreign intercourse. This narrative has shown the part taken by American diplomatists in this reformation. It is a matter of just pride to every citizen of the United States that his government and its representatives abroad have done their full share in purifying diplomacy and making it stand for the best ideals of mankind.

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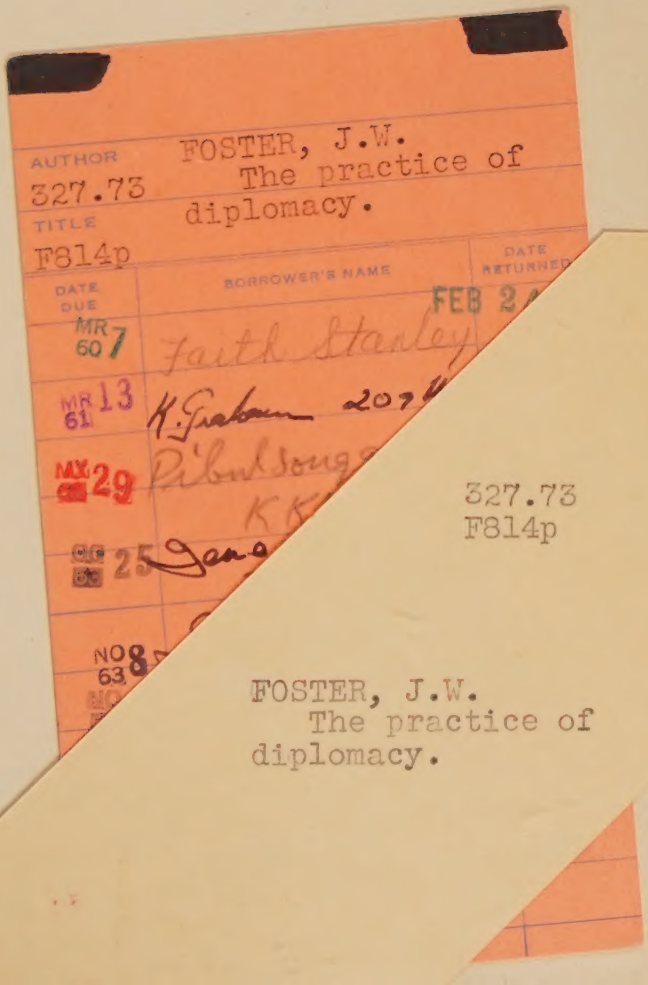
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